# (26,510, 26,511)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1918.**

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## No. 449.

ALLANWILDE TRANSPORT CORPORATION

*vs.*

VACUUM OIL COMPANY.

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## No. 450.

ALLANWILDE TRANSPORT CORPORATION

*vs.*

A. W. PIDWELL.

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**ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.**

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 13, 1918.

1 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1918.

No. 2337, No. 2387.

THE ALLANWILDE.

Appeals by the Allanwilde Transport Corporation, Claimant, Appellant, from Decrees of the District Court of the United States for the District of New Jersey.

In Admiralty.

Before Buffington, McPherson, and Woolley, Circuit Judges.

In order that the pending appeals may be properly decided, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court upon the questions or propositions of law hereafter stated. The questions arise upon the following facts:

On Nov. 1, 1917, the American schooner Allanwilde was seized under two libels in rem filed in the United States District Court for the District of New Jersey. Each libelant obtained a decree, and on Dec. 14 the vessel was sold, the proceeds being now in the rigistry of the court. The Allanwilde Transport Corporation was the owner of the vessel, and the libelants were the Vacuum Oil Co. and A. W. Pidwell respectively, each of whom had shipped certain goods to be carried from New York to Rochefort, France. In some respects the contract of shipment vary, the differences being as follows:

2 In May 1917 the Oil Co. chartered the vessel for a voyage from New York to Genoa (afterward changed to Rochefort) to carry a cargo of oil in barrels at the rate of $16.50 per barrel (afterward changed by agreement to $15.25). The charter-party contained inter alia the following provision:

"* * * freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission, or insurance. Freight earned, retained and irrevocable, vessel lost or not lost."

A full copy of the charter-party is attached hereto and made part hereof. On Aug. 25, the oil having been loaded, the vessel issued a bill of lading containing inter alia the following provision: "All conditions and exceptions of charter-party are to be considered as embodied in this bill of lading." A copy of the bill is attached hereto and made part hereof.

The other libelant, A. W. Pidwell, was permitted to ship certain kegs of wire nails on the vessel, and on Aug. 15 a bill of lading was

issued to him, of which a full copy is attached hereto and made part hereof. Inter alia the bill provided as follows:

"11. The carrier shall not be liable as carrier or otherwise for any loss, damage, delay or default, whether occur-ing during transit or before or after or during or while awaiting loading, transshipment, discharge, delivery or other disposition of the goods, or on board or in lighters or craft or on wharf or in warehouse at any port *of* place occasioned by any of the following excepted causes, throughout this contract always excepted: By causes beyond the carrier's reasonable control; * * * by arrest or restraint of governments, princes, rulers or peoples; * * * by prolongation of the voyage: * * *."

Paragraph 5 of the bill is in part as follows:

"5. Full freight to destination, whether intended to be prepaid or collect at destination and all advance charges against the goods are due and payable to (the Allanwilde Transport Corporation) upon receipt of the goods by the latter; and the same and any further sums becoming payable to the carrier hereunder, and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the carrier in respect of the goods (not required hereunder to be borne by the carrier) shall be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service hereunder without deduction (if unpaid), or refund in whole or in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up; and shall be payable in United States currency and in New York funds; and the carrier shall have a lien on the goods therefor (whether payable in advance or not, and though noted hereon as prepaid) surviving delivery, and in case of loss of any part of the goods shall have a lien on the goods or any part or proceeds for the whole thereof; and the shipper, consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding any lien therefor *as* been surrendered. * * * If there be an enforced interruption or abandonment of the voyage at any port of distress or elsewhere, and the goods or any part be forwarded, the cost thereof, including extra compensation, if performed by vessels in the service of the carrier, shall be paid by shipper, consignee and/or assigns."

In pursuance of the contracts thus evidenced, the oil and the nails were shipped on the Allanwilde and the freight was paid in advance—$49,745.50 for the oil and $3,128 for the nails.

On September 11 the vessel cleared from New York, and set sail for Rochefort. The vessel was seaworthy, and was properly manned and equipped. After she had been out 14 days, and was about 500 miles from New York, she encountered a storm so severe that her boats were carried away and she sprang a leak so threatening that the water in her hold was 3 or 4 feet deep and was gaining on the pumps. Thereupon the master properly decided that he must seek a port of refuge for safety and repair. Halifax also was about 500 miles away, but in that direction the wind was against him, while it was favorable for New York, and on this account as well as for other good reasons he headed for New York, where he arrived on Oct. 5,

having been out 24 days. Repairs were undertaken at once, the cargo remaining on board meanwhile.

On Sept. 28, while the vessel was at sea, the government decided to refuse clearance thereafter to any sailing-vessel bound for the war zone, as will appear from the Instructions and the Official Bulletin, copies of which are attached hereto and made part hereof. The master did not know of this decision until the vessel returned to New York; he received no information from the shore after Sep.
4 11. The repairs having been finished, the vessel attempted to resume her voyage, but clearance was refused, and none could be obtained in spite of her efforts to induce the government to modify its stand. Toward the end of October the shippers were notified by the carrier to unload their goods, and this they did, but under protest and reserving their rights. Afterwards, the oil was forwarded by steamship, but at a higher rate of freight and under other charges. What became of the nails after they were unloaded, does not appear. The vessel declined to refund the freight to either shipper, and the libels were filed to recover not only the prepaid freight, but also damages for failure to carry. On each libel the district court entered a decree for the prepaid freight alone, refusing recovery for the other damages.

Under the foregoing facts, the Court of Appeals desires instruction on the following questions:

1. Was the adventure frustrated, and was the contract evidenced by the charter-party and by the bill of lading issued to the Oil Co. dissolved, so as to relieve the carrier from further obligation to carry the oil?

2. Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

3. Was the adventure frustrated, and was the contract evidenced by the bill of lading issued to Pidwell dissolved, so as to relieve the carrier from further obligation to carry the nails?

4. Whatever answer may be given to the third question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

(Signed) JOS. BUFFINGTON,
JOHN B. McPHERSON,
VICTOR B. WOOLLEY,
*Circuit Judges.*

5 Vacuum Oil Co.,

No. 61 Broadway, New York.

This Charter Party, made in the City of New York, the 26th day of May, 1917, Between Allanwilde Transport Corporation, Owners of the Amer. Schr. "Allanwilde" of —— classed A-1½ and to be so maintained during the service, of the burthen of 564 net tons, or thereabouts, register measurement, now trading of the first part, and Vacuum Oil Company of the second part:

Witnesseth, that the said party of the first part agrees on the freighting and chartering of the whole of the said vessel, (with the exception of the deck, cabin and necessary room for the crew and storage of provisions, sails, and cables), unto the party of the second part, for a voyage from the port of New York, N. Y., to Genoa, Italy, on the terms following:

1. The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, including proper ballast and dunnage, and shall receive on board for the aforesaid voyage a full cargo of Lubricating Oil in barrels, which the said party of the second part doth engage to provide and furnish; the vessel's capacity being estimated to be 3,700 barrels.

2. The said party of the second part agrees to pay to said party of the first part, or Agents, for the use of said vessel during the voyage aforesaid: Sixteen Dollars and Fifty Cents ($16.50) per Barrel. Freight to be prepaid net on signing Bills of Lading in U. S. Gold or equivalent, free of discount, commission or insurance. Freight earned retained and irrevocable, vessel lost or not lost, on each and every barrel delivered, whether full, part full, or empty.

* * * * * * *

4. No goods or merchandise, except from the said party of the second part, or his Agents shall be laden on board the vessel without his written consent.

5. The vessel shall haul to such loading berth or berths (where she can lie always afloat, in safety), as may be designated by the Charterer, or his Agents, but, if ordered to haul more than once, the Charterer shall pay all subsequent towage.

6. * * * Cargo to be discharged with customary despatch, and to be delivered at the port or ports of discharge free of vessel's tackles where she can lie afloat and in safety. Twenty (20) running days for loading and discharge inclusive.

7. The lay days for loading are not to commence before June 20th, 1917, except with the consent of the Charterer, or his Agents, and if the vessel is not ready to load by two o'clock P. M. on July 31st, 1917, the Charterer shall have the option of cancelling or maintaining this charter, to be decided when vessel is discharged.

8. For each and every day's detention by default of the said Charterer or his Agents, demurrage shall be paid by the Charterer, or his Agents, to the Owners, or their Agents, Two Hundred Fifty Dollars per day.

9. The cargo to be received and delivered alongside, within reach of the vessel's tackles, where she can lie afloat and in safety.

10. The vessel to be loaded under the usual stowage inspection at loading berth or berths, if required by the Charterer, free of charge to the vessel for such inspection.

11. The vessel's stevedores for loading to be approved by the Charterer, or his Agents; and the stevedores for discharging to be appointed by consignees, but to be under the direction and control of the Master of the vessel, which is to be charged only customary rates for competent stevedores.

12. * * * The Master to call at the Shipper's office to sign Bills of Lading when required.

13. The Charterer's responsibility shall cease when the cargo is all on board and Bills of Lading signed, but the Master and
6 Owners shall have an absolute lien on the cargo for the freight, dead freight or demurrage.

* * * * * * *

16. Vessel, if loaded at New York, shall proceed to sea via Sandy Hook.

17. Should the vessel put into a port of distress, or be under average, she is to be consigned to Charterer, or his Agents, paying him or them usual charges and cimmissions, and in case a General Average statement be required, the same is to be adjusted at New York by adjusters to be appointed by Charterer, who are to attend to the settlement and collection of the average, subject to customary charges; General Average, if any, to be adjusted according to York-Antwerp Rules of 1890, and as to matters not therein provided for, according to the usages and customs of the port of New York.

18. This Charter Party shall be subject to the Maritime Rules of the New York Produce Exchange, and any disputes at the port of loading between the Captain and the Charterer, shall be settled by arbitration before the Committee on Maritime Affairs of the New York Produce Exchange, whose decision shall be final and binding upon both parties.

19. It is also mutually agreed that this Charter Party shall be subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States of America, approved on the 13th day of February, 1893, and entitled "An Act relating to navigation of vessels, etc."; and Bills of Lading to be issued in conformity with such Act.

20. A commission of 2½ per cent. upon the gross amount of this Charter is due to J. A. Elliot & Co. ½ of which to G. T. Linton by the vessel and Owners, upon signing of Bills of Lading.

21. To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the vessel, freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated freight under the within Charter.

In Witness Whereof, we have hereunto set our hands, the day and year first above written.

ALLANWILDE TRANSPORT CORPORATION.
(Sgd.) LYALL DEAN, *Treas.*
VACUUM OIL COMPANY.
(Sgd.) C. D. H. HOWLAND,
*Mgr. Foreign Shipping Dept.*

Signed in presence of
O. F. MALCOLM.

7 *Bill of Lading Issued to Vacuum Oil Co.*

"3262 bbls. at 15.25 per bbl. net 49,745.50.
Freight Prepaid.
Eleven Days Loading.

Shipped in good order and condition, by Vacuum Oil Company on board the American schooner called the Allanwilde whereof Thom I. Thomassen is master, now lying at the Port of New York and bound for Rochefort. To say Three Thousand Two Hundred Sixty Two (3,262) Barrels Lubricating Oil being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of Rochefort (the dangers of the seas only excepted) unto order of Vacuum Oil Company S. A. F. or to their assigns, he or they paying freight for the said bbls. as per margin per bbl. delivered and all other conditions and exceptions as per Charter Party dated New York May 25/17. General average, if any, according to York-Antwerp rules 1890. In witness whereof the master or purser of the said vessel hath affirmed to Four Bills of Lading all of this tenor and date, one of which being accomplished, the others to stand void.

It is Mutually Agreed, that this shipment is subject to all terms and provisions of and to all the exemptions from liability contained in the Act of Congress of the United States relating to Navigation, &c., approved on the 13th day of February, 1893.

Dated in New York the 25th day of August, 1917.

All Conditions and Exceptions of Charter Party are to be Considered as Embodied in this Bill of Lading.

Gauge and Contents, Quality and Value unknown and not accountable for leakage, or rust. Freight payable in Cash without discount on each and every case delivered, full, part full or empty.

THOM THOMASSEN, *Master.*"

8 Instructions of Treasury Department dated September 28th, 1917, as follows:

"Withhold clearance any sailing vessel if any part of her voyage would bring her within danger zone. Advise shippers when presenting licenses with export declarations that the license will be inoperative if goods are to be shipped on such sailing vessel and that application to make shipments on such vessels must be made to Bureau Export Licenses."

*Official Bulletin.*

Published Daily, under Order of the President, by the Committee on Public Information, George Creel, Chairman.

Washington,
Saturday, September 29, 1917.

## Will not License Shipments Carried by Sailing Vessels Going Through the War Zone.

The Exports Administrative Board, in accordance with requests made by the United States Shipping Board and by the Navy Department, has instructed the Director of the Bureau of Export Licenses not to grant licenses for any proposed shipments by sailing vessels going through the war zone. It is, of course, obvious that steamers can navigate the war zone with less danger than slow-sailing craft, and sailing ships, if used in safer waters, would to an extent release steam vessels now used in such waters.

The attention of shippers is, therefore, called to the fact that clearance will be refused sailing vessels destined to proceed through the war zone regardless of the fact that the goods themselves may have already been licensed. Licenses will be granted in the future for shipments to European countries only on condition that the goods are to be shipped by some vessel other than a sailing vessel. The Board will revoke licenses covering goods to be shipped through the war zone if any shippers attempt to ship them by sailing vessel.

9 *Bill of Lading Issued to A. W. Pidwell.*

Allanwilde Transport Corporation.

Straight Bill of Lading, Not Negotiable.

Received by Allanwilde Transport Corporation (the term Carrier hereinafter used to be taken as including said Company and any substitute or continuing Carrier) from the shipper named on the back hereof, the packages described on the back hereof (hereinafter called the Goods, the Carrier's responsibility in respect of description thereof being limited as hereinafter provided) in apparent good order and condition; To Be Transported by steamship named on the back hereof (subject to substitution and other liberties as hereinafter provided, the term Vessel hereinafter used to be taken as including said steamship and any substituted or continuing vessel) to the destination named on the back hereof, or as near thereto as the Vessel can safely get, and there delivered in like good order and condition, in manner as hereinafter provided, upon payment of any unpaid freight and other sums payable hereunder by shipper, consignee and or assigns, to the consignee named on the back hereof, or order if so provided, subject always to the

Terms of This Contract which are Hereby Mutually Agreed Upon as Follows:

1. The freight is adjusted in consideration of all the terms and provisions of this contract whether written, printed or stamped.

2. All particulars herein mentioned of the Goods, except only the number of the packages with the marks thereon, are those declared by the shipper, and the same (including anything as to size, weight, quantity, or the like implied by the character of packages designated) are unknown to the Carrier and shall not constitute, as against the Carrier, any part of the Carrier's description of the Goods as hereby receipted for, but shall be deemed only representations of the shipper.

3. The Goods, whether perishable or not, are accepted by the Carrier subject to delays or default in shipment, transportation, delivery or otherwise, occasioned by war or rebellion; riots, strikes, stoppage of labor, lockouts or labor troubles of Carrier's employees or others; shortage of labor, fuel, conveyances or room; lack of facilities of any sort; accumulation of cargo; weather, or any conditions not shown due to the Carrier's fault; and notice to shipper, or others of any danger of such delay or default is hereby waived; and the Carrier shall not be responsible for any such delay or default; and if loading of the goods in customary manner is delayed, or the Vessel is likely to be detained she may proceed forthwith without loading or completing the loading of the Goods.

4. The Carrier's responsibility in respect of the Goods as a carrier shall not attach until the Goods are actually loaded for transportation upon the Vessel, and shall terminate, without notice, as soon as the Goods leave the Vessel's tackles at destination or other place where the Carrier is authorized to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the Goods attaching prior to such loading or continuing after leaving the Vessel's tackles as aforesaid, whether the Goods are in course of lighterage by the Carrier or however else the same may be situated, shall be the same only as that of a warehouseman, without liability on the part of the Carrier, except for want of ordinary care, and all conditions, exemptions, exceptions, and limitations of the liability of the Carrier contained in this contract shall be deemed to apply also to such warehouseman's liability as well as to liability as a carrier. The Carrier may place the Goods in store while awaiting loading, transshipment, forwarding or delivery and shall thereupon be discharged of all responsibility for loss of or damage to the Goods while so stored.

5. Full freight to destination, whether intended to be prepaid or collect at destination, and all advance charges against the Goods are due and payable to the Allanwilde Transport Corporation upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods, (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and

payable to the Carrier at any stage before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), Goods or Vessel lost or not lost, or if the voyage be broken up; and shall be payable in United States currency and in New York funds; and the Carrier shall have a lien on the Goods therefor (whether payable in advance or not and though noted hereon as prepaid), surviving delivery, and in case of loss of any part of the Goods shall have a lien on the Goods or any part or proceeds for the whole thereof; and the shipper, consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding any lien therefor has been surrendered. Full freight shall be payable on damaged and unsound goods. The Carrier may collect freight on bill of lading weight, measurement or quantity, and, if gross weight measurement or quantity delivered exceeds weight, measure or quantity on which freight may be computed, the Carrier may collect freight on such excess, unless shown to have been caused by absorption of water during the voyage. Any error in freight or other charges or in the classification herein of the Goods is subject to correction, and if on correction the freight or charges are higher, the Carrier may collect the additional amount. Should a package consist of several parcels for more than one person, full freight shall be paid on the parcels for each person as if shipped and consigned as a separate package. If there be an enforced interruption or abandonment of the voyage at a port of distress or elsewhere and the Goods or any part be forwarded, the cost thereof, including extra compensation if performed by vessels in the service of the Carrier, shall be paid by shipper, consignee and/or assigns.

6. The shipper, consignee and/or assigns, shall pay any duty, tax, impost, fee or the like for which the Carrier may be charged upon account of the Goods, not due to the Carrier's fault, and also any fine or penalty incurred by, or loss or expense occasioned to the Carrier by reason of illegal, incorrect or insufficient documents or markings or numbering of packages or goods, or description of contents or weight or other particulars or by reason of any other act or omission of shipper, consignee and/or assigns.

7. In case of a single article or package exceeding two tons in weight, the true weight thereof shall be declared at time of delivery to the Carrier; in case no weight is declared or (in case of any weight package) the weight declared is incorrect and in consequence of reliance thereon any loss or damage arises, either to the article or package, or to the Carrier or to others, or if any inceased charges or expenses are incurred by the Carrier in handling or caring for any such article or package, the same shall be borne and paid solely by the shipper, consignee and/or assigns.

8. The Vessel shall have liberty hereunder, either before or after proceeding to or toward any port of discharge or transshipment, to proceed to or toward, call, enter, or stay at any port or ports, although not upon the usual or any route to, and although in a contrary direction to or beyond the port of discharge or transshipment, once or oftener, backwards or forwards, in any order of rotation, for any purposes whatsoever, though pertaining to another voyage, and

the same shall not be deemed a deviation but be deemed within the voyage hereby intended as fully as if specifically described herein; and the Vessel shall have liberty also to sail in or out of ports and to proceed with or without pilots, to tow and assist vessels in any
11 situation and to deviate for the purpose of saving life or property; to proceed under sail or in tow; and in case of salvage service rendered to the Goods during the voyage by another vessel belonging to or in the service of the same Carrier, such services shall be paid for as fully as if the salving vessel belonged to or was in the service of strangers.

9. The Carrier shall have liberty, in its discretion, before or after shipment or loading, to substitute, or ship the whole or any portion of the Goods by any other steamship or steamships altho prior or subsequent; and shall have liberty in its discretion at any port or place, to transship, land and transship or forward the goods, or put into store, craft or other available place and thence transship or forward the same to, or en route to destination, by any vessels, crafts or other conveyances, by land and or water, subject if transshipped to a continuing carrier to the provisions of the usual bill of lading of such carrier whether issued or not, and on deck if required by any continuing carrier or the character of any vessel or craft and upon delivery of the Goods into the custody of a continuing carrier, or representatives, shall thereupon be relieved of all further responsibility for the goods, and the clean receipt of the continuing carrier, or representative, shall be evidence as against shipper, consignee and/or assigns of delivery of the Goods to the continuing carrier in good order and condition. In case of transshipment the Carrier may delay forwarding awaiting a vessel or conveyance in its own service or with which it has established connections. Cargo for ports or places in Porto Rico other than San Juan, may be transshipped or otherwise treated in accordance with the privileges of this or other articles at San Juan or other Porto Rican port, at shipper's risk but ship's expense, lighterage, wharfage, and other landing charges at destination to be paid by consignee.

10. If the Vessel is prevented by Quarantine from entering or from making due disposition or delivery of the Goods, or is detained at Quarantine, the Goods may be forthwith, without notice, discharged into lazarettos, craft or other places immediately available, at the risk and expense of shipper, consignee and/or assigns, and such discharge shall be complete delivery of the Goods hereunder and all responsibility of the carrier therefor as carrier or otherwise, shall end without notice as soon as the Goods leave the Vessel's tackle and full freight be payable. If, by reason of Quarantine, blockade, war, hostilities, conditions of surf or weather, shortage of lighters, riots, or of strikes, lockouts, stoppage or shortage of labor, of the Carrier's employees or others, or by reason of any of the Excepted Causes mentioned elsewhere in this Bill of Lading, or other conditions, existing or threatened at the port of transshipment or discharge of the goods or elsewhere, the vessel is, or in the master's opinion is likely to be prevented or delayed from reaching or from entering, or from making due delivery of the Goods at the port of

transshipment or discharge, or delayed at said port or in discharging there beyond the usual time, then either with or without proceeding to or toward or entering or attempting to enter said port, the Goods may be retained on board and discharged on return trip or subsequent voyage, subject to all liberties of this bill of lading, or be discharged as convenient for the vessel at any other port to which the Vessel is bound or may proceed, at risk and expense of shipper, consignee and/or assigns, all responsibility of the Carrier being ended upon such discharge and full freight together with extra compensation for additional transportation being payable, and at the Carrier's option the Goods may be carried on or forwarded to destination from any other port at which so discharged at risk and expense of shipper, consignee and/or as-igns, subject in any
12 case hereunder to the provisions in other respects of this bill of lading if transportation is performed by the carrier, or to the usual bill of lading of any other carrier performing the same. The Carrier may, in its discretion, in order to secure despatch for the Vessel at port of discharge or transshipment of the Goods proceed thence with the whole or any portion of the Goods on board and discharge the same on the return trip or subsequent voyage, or discharge the same at any other port and thence carry or forward the same at Carrier's convenience to destination at Vessel's expense, but risk of shipper, consignee, and/or assigns in either case, subject in other respects to the provisions of this bill of lading in case of transportation by the carrier or of the usual bill of lading of any other carrier performing the same.

11. The carrier shall not be liable, as carrier or otherwise for any loss, damage, delay or default, whether occur-ing during transit or before, or after or during or while awaiting loading, transshipment, discharge, delivery or other disposition of the goods, or on board or in lighters or craft, or on wharf or in warehouse, at any port or place, occasioned by any of the following Excepted Causes, throughout this Contract always excepted: By causes beyond the carrier's reasonable control; by dangers or accidents of the sea or other waters or canals or of navigation or transportation of whatsoever nature or kind; by fire or explosion from any cause whatsoever occur-ing; by barratry, theft or embezzlement of master or crew; by act of God; by enemies, pirates, robbers or thieves; by arrest or restraint of Governments, princes, rulers, or peoples; by prolongation of the voyage; by legal process or stoppage in transitu; by fumigation or other treatment required by quarantine or sanitary authorities, by pestilence, riots, wars, rebellions; by strikes or stoppage of labor, or labor troubles, or Carrier's employees or others; by explosion or bursting of boilers, damage from steam, breakage of shafts, accidents to or from machinery or breakage or derangement thereof; by any latent or other defect in hull, machinery or appurtenances of the Vessel or any craft or unseaworthiness thereof, although existing at the time of shipment or transshipment or at the beginning of the voyage, provided due diligence shall have been exercised to make the same seaworthy; by collisions, grounding or stranding; by heating, heat of holds, or effects of climate; by ice, earthquakes, sea water, wetting,

rain or spray, frost, decay, putrefaction, ferment, rust, stains, sweat, floods or freshets; by giving away, falling, or destruction of wharf, shed or warehouse; by damage incident to transportation; by change of character, loss of weight or contents, drainage, leakage, breakage, shrinkage or wastage; by cooperage or mending; by vermin or rat damage; by stowage or contact with, or smell, evaporation, leakage, escape of contents or taint from other goods, the Vessel being privileged to carry any other articles, whether hazardous or not and live stock as cargo or otherwise, on and/or under deck; by nature of the Goods or cargo or injury to or deterioration or insufficiency of packages; by explosion of any cargo, whether shipped with or without disclosure of its nature or condition; by obliteration, error, insufficiency or absence of marks, numbers, address or description; by land damage, risk or craft, hulk or transshipment; by faults or errors in navigation or management of the vessel, provided due diligence shall have been exercised to make the vessel in all respects seaworthy and properly manned, equipped and supplied; by any act or omission of shipper or owner of the Goods or of his agent or representative. Flour, meal, corn, rice and other foodstuffs in sacks, being subject to minor loss of contents notwithstanding due care, it is mutually agreed that, to the extent of one twentieth of the
13 original weight, loss of contents of any such package shall be deemed without Carrier's fault, and the Carrier shall not be responsible therefor.

12. The shipper shall be liable for and bear any loss or damage to the Carrier or to others caused by inflammable explosive, noxious, hazardous or dangerous goods or articles shipped without full disclosure of their nature at the time of lading and entering thereon, whether shipper be principal or agent, or aware of the nature of the goods or articles or not; and such goods or articles may be thrown overboard or destroyed at any time by the Carrier without compensation to any person; and extra charges and expenses if any, for discharging, lightering, handling or caring for, or otherwise occasioned by such goods or articles, or those declared or considered noxious or hazardous by the civil or military authorities of any port, shall be borne by the Shipper, consignee and/or assigns. Goods or articles of such character may be carried on deck, as well as any other whose nature or bulk requires them to be so carried, and the same shall be at the risk of the shipper, consignee and/or assigns.

13. General Average shall be payable according to York-Antwerp Rules of 1890, and as to matters not therein provided for according to the law and usage at the port of New York. If the ship owner shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from the fault or error in navigation or in the management of the Vessel or from any latent or other defect in the Vessel, her machinery and appurtenances, or from unseaworthiness, although existing at time of shipment or at the beginning of the voyage (provided the defect or unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo

shall nevertheless pay salvage and any special charge incurred in respect of the cargo and shall contribute with the ship owners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

14. This shipment is subject to all the terms and provisions of the Act of Congress of the United States, approved February 13th, 1893, entitled "An Act relating to the navigation of vessels," &c., and of Sections 4282 to 4287, each inclusive, of the United States Revised Statutes. The Carrier shall not be liable for gold or other precious metals, precious stones, bills, notes or securities documents, pictures, glass, china, silk, furs, lace or any of the articles enumerated in Section 4281 of the United States Revised Statutes, except in accordance with such statute, and after written notice of the character and value thereof at the time of loading and entry thereof.

15. The Carrier shall not be responsible for specie, bullion, jewelry, plate, precious stones or metals, bank notes, bonds or other negotiable documents or valuables until actually delivered on board of the Vessel to the master or other officer in charge of the deck at the time and signed for by him. Delivery must be taken on the Vessel's deck at port of discharge, and the Carrier's responsibility shall thereupon cease. Such articles are received and the rate of freight has been specially adjusted upon the condition and understanding that the value thereof has been insured by the shipper or others for account of the Carrier in respect of its liability, under usual form of Lloyds Policy or equivalent, and that the shipper by accepting this bill of lading represents that such insurance has been effected, and undertakes that the Policy shall be available for the Carrier's pro-
14 tection in case of need.

16. The Carrier does not undertake that the Vessel is equipped with refrigerated or specially cooled or ventilated compartments or otherwise equipped for the transportation of goods or articles of a perishable nature, nor whether so equipped or not, to transport such or any other goods or articles in any such compartment or otherwise than as ordinary cargo, and shall not be liable for any loss or damage from failure so to do, unless such transportation is expressly stipulated for herein. Fresh fruits, vegetables, and meats, and any goods or articles of a perishable nature, however, carried, are received and carried at the sole risk of the owner thereof. The Carrier shall not be responsible for any loss or damage to such goods or articles from temperature or atmospheric conditions, risks of refrigeration, cooling, or ventilation, accident to or latent or other defect in, or explosion, breakage derangement, insufficiency, shortage or failure in any respect or unseaworthiness of, or in respect of any refrigerator or refrigerated or specially cooled or ventilated compartment or plant, or apparatus, boiler, engine, machinery, appliances, materials or supplies therefor, or any part thereof, although existing at time of shipment or transshipment, or at the beginning of the voyage, provided due diligence shall have been exercised to make the vessel seaworthy; and if any such goods or articles shall at any stage be, or in the opinion of the master or Carrier's representative,

be decayed, injurious or offensive, the same may be thrown overboard or destroyed without notice, before or after arrival, and the Carrier shall not be responsible therefor. The Carrier may discharge any such goods or articles or other cargo without notice, immediately the Vessel is ready, notwithstanding danger to such goods or articles from freezing or other weather conditions, and all such goods or articles are received subject to the risk of such discharge, and if delivery thereof is not taken, without notice, from the Vessel's tackles, or, at Vessel's option, from the wharf as soon as available after landing, the same may be left on the wharf or other convenient place at risk of shipper, consignee and/or assigns. The provisions of this Article are in addition to and not in substitution for the other provisions of this Bill of Lading, and all goods of such nature as mentioned herein or to be carried in refrigerated or specially cooled or ventilated compartments are received and are subject also to all other terms, conditions, exceptions, and limitations as to liability contained in this bill of lading.

17. This Vessel may commence discharging upon arrival immediately she is ready, without notice, at any hour of day or night, and discharge with or without intermission, at wharf, in stream or elsewhere, at Carrier's convenience, any custom of the port to the contrary notwithstanding, except that in United States ports delivery need be taken only during usual working hours, and the Collector of the Port is hereby authorized to grant an Order for the discharge of the cargo immediately after Entry of the Vessel. Whether the vessel be discharged at wharf or in stream or elsewhere, the Goods may, without notice, be in whole or part discharged over side into lighters or other craft at risk and expense of shipper, consignee and /or assigns from the time the goods leave the vessel's tackles, the Carrier being hereby authorized to employ or appoint lightermen contractors, and/or others, without responsibility of the carrier for the character or condition of any craft, for account of shipper, consignee and/or assigns, notwithstanding the latter are at hand with their own craft. Delivery of goods shall be received without notice from the Vessel's tackles, as the Goods come to hand in unloading, or as soon as available if discharged on the Carrier's wharf. If not so received, the master or agent of the Vessel is hereby authorized at the risk and expense and for account of the shipper, consignee and/or assigns, without notice, to enter and discharge the goods depositing them in hulk or craft or in or upon wharf, warehouse, Public Stores, or Custom House, or permitting them to lie where landed, or making such disposition thereof as the authorities of the *part* may direct, subject at all times to any lien of the carrier, including storage charges by the Carrier, and to that end employ such lightermen, truckmen, warehousemen, wharfingers or other agencies as may be requisite, customary or proper, who shall be deemed the agents solely of shipper, consignee and/or assigns and not of the Carrier, the latter being hereby relieved of all responsibility for or in respect of the Goods, without notice to any person whatsoever, as soon as the same leave the Vessel's tackles. If the shipper, consignees, or assigns entitled to the goods shall not within forty-

eight hours after unloading, without notice, pay the freight and all other sums payable to the Carrier by Shipper, consignee, and/or assigns, and relieve the Carrier from all further responsibility and expense for storage charges or otherwise in respect to the Goods, the Carrier is hereby authorized at any time on forty-eight hours' notice by mail to Consignee or assigns, or other person named for notice in the bill of lading, or if such consignee or assigns or other person is unknown or cannot be found in the port, then, without notice, to sell the goods and retain and pay from the proceeds the expenses hereunder and all sums due the carrier in respect of the Goods from Shipper, consignee and/or assigns and all other charges on the Goods, and the Carrier shall upon sale be discharged of all liability in respect of the Goods except to account for the proceeds. Goods consigned to New York may be delivered in Brooklyn, Jersey City, Hoboken, Weehawken, or elsewhere in the Port of New York at Carrier's convenience.

18. The Carrier shall not owe any duty to notify consignee or others of the arrival or disposition of the goods, nor be liable for any loss or damage arising from not doing so except where otherwise expressly required herein. If the consignment herein be to order with provisions for notice to a person named, notice to such person shall be required only when notice to a named consignee would be required hereunder.

19. If the Goods are landed on a Government wharf to be taken charge of, handled or moved by any concessionaire or Government agent or nominee, or for the performance of any duty in respect thereof by the customs or other authorities, or delivered into the custody of such authorities or others, any responsibility of the carrier shall be ended without notice to the consignee, authorities, wharfingers, concessionaires, or others, as soon as the Goods are so landed or delivered; and the goods shall be deemed thereupon in the sole custody of the wharfingers and/or of such concessionaire, agent or nominee and the customs and other authorities who shall be deemed the agents solely of the consignee or other person entitled to the Goods; but the Goods shall continue subject to any lien of the Carrier.

20. The Goods shall be subject to charges for mending and repair of packages which shall be a lien thereon and paid by shipper, consignee, and/or assigns; sweepings if any, and unclaimed goods not otherwise accounted for, shall at Carrier's option be apportioned to the different consignees of like goods according to the shortages and be accepted as good delivery to the extent thereof; and if any consignee has a shortage in marks or numbers called for herein, unclaimed goods of like kind but of different mark or numbers shall, at Carrier's option, be deemed to constitute a part of the Goods
16 and be accepted by consignee and/or assigns as good delivery hereunder.

21. Unless a higher value be stated herein, the value of the Goods does not exceed $100 per package, nor $8 per cubic foot, and the freight thereon has been adjusted on such valuation and no oral declaration or agreement shall be evidenced of a different valuation.

In computing any liability of the Carrier in respect to the Goods, no value shall be pleaded thereon higher than the invoice cost (including freight prepaid hereunder) not exceeding $100 per package nor $8 per cubic foot (or such other value as may be stated herein); nor shall the Carrier be held liable for any profits or increase of price or value over such cost not exceeding said value, nor for any special or consequential damage and the Carrier shall always have the option of replacing any lost or damaged goods.

22. If there is opportunity to discover by examination, before removal of the Goods that loss of contents or shortage of, or damage to the Goods exists or may exist, the Carrier shall not be liable for any such loss, shortage or damage unless notice of claim therefor be presented in writing to the Carrier or to the master or agent of the Vessel before removal of the Goods. If there is no opportunity to discover before removal that such loss, shortage or damage exists or may exist, then the Carrier shall not be liable therefor unless such notice of claim be so presented within 48 hours after removal of the Goods. The Carrier or Vessel shall not, in any event, be liable for any claim or demand arising hereunder or in respect of the Goods, unless notice of the claim be presented in writing to the Carrier within thirty days after the delivery of the Goods to the Carrier, nor unless suit therefor be commenced within six months after the delivery of the goods to the Carrier, and the lapse of such period shall be deemed a complete bar to recovery in any such suit or proceeding not sooner commenced, notwithstanding the Carrier may be a non resident or a foreign corporation. Nothing shall be deemed a waiver of the provisions of this article except a written express waiver signed by the Carrier.

23. In case of any loss or damage for which the Carrier shall be liable, the Carrier shall to the extent of such liability have the full benefit of any insurance that may have been effected upon the Goods or against said loss or damage, as well also of any payment to insured by underwriters repayable only out of recovery against the Carrier, notwithstanding the underwriters are not obligated to make such payment.

24. Whether so stated or not, if this bill of lading is issued against lighter, warehouse, or shipping receipt or another bill of lading, or any similar document the issue of such document shall be deemed a prior carrier or custodian of the goods, subject to the provisions of such document, and the Carrier issuing this contract shall not be responsible for the goods until actually delivered into its custody. If the vessel for Carrier's convenience or otherwise, loads in whole or part in stream or elsewhere than alongside where the goods are received for shipment, the Goods may be transferred to the Vessel at risk and expense of shipper, consignee and/or assigns until loaded on the Vessel, the Carrier being authorized to employ or appoint transfer agents and/or others therefor to be deemed the agents solely of shipper, consignee and/or assigns. The Goods may be transported at any stage by lighter or craft, either in course of loading, transshipment or delivery, or en route to destination or otherwise. All such transportation, whether at Carrier's

expense or not, shall be at risk of shipper, consignee and/or assigns, subject in other respects to the provisions of this bill of lading, and if entrusted by the Carrier to others shall be deemed to be by connecting carriers subject to their usual contract without responsibility of the Carrier in respect thereof.

17 25. Unless special care in consideration of increased freight has been arranged for and is provided for herein, all cargo is subject to a stowage in holds and handling in quantities along with other cargo in any customary manner required for usual despatch, and to such stowage as available when the cargo is received or as to the nature of the other cargo permits, and to contact with other cargo, working and pressure and the like, and the rate of freight is adjusted with reference to such handling and stowage only. All cargo liable to loss or injury by breakage, contact with other cargo, or in any other manner under such conditions, should be so wrapped, cased or packed as adequately to protect the same therefrom; and the Carrier shall not be answerable for any loss or injury to foodstuffs or other loose materials in single bags, liquids in tins, plate glass, unwrapped bales of skins or other cargo, unprotected cargo of any sort, or to any other cargo when such loss or injury would not have been received if the cargo had been so protected, and shipper, consignee and/or assigns of any cargo not so protected shall be answerable for and bear any loss or damage to the Carrier or others arising therefrom. Live birds or animals and live stock are received at sole risk of shipper, consignee and/or assigns, and subject in other respects to the provisions of this bill of lading, the Vessel not having any special equipment therefor, and are to be deemed included in the term "Goods."

26. This Bill of Lading, duly endorsed, shall if required, be given up to the Carrier in exchange for a delivery order, but if issued as a straight bill of lading, this clause shall not apply thereto nor any provisions of other clauses respecting assigns inconsistent with a straight bill of lading.

27. This Bill of Lading shall be construed and the rights of the parties thereunder determined according to the law of the United States.

28. It is mutually agreed, in addition to the other terms and conditions of the bill of lading, which shall be deemed affected only in so far as inconsistent herewith, this shipment is at the sole risk of the owners thereof, of all risks of war, arrest, restraint, capture, seizure, detention, sinking, interference or hostilities on the part of any Power and of all consequences thereof; and the Vessel shall have liberty in the discretion of the master, owner, charterer, or any agent thereof, to proceed notwithstanding any such risks and armed or unarmed, also if deemed advisable in the judgment of such master, owner, charterer, or agent, in order to avoid loss, damage, delay, expense, or other disadvantage or danger to vessel, cargo, passengers or other interest, to wait at the port of shipment or elsewhere, and/or either with or without proceeding to go toward the port of discharge or entering or attempting to enter or discharge the goods there, and

whether such proceeding, entry or discharge be permitted or not, to proceed to or towards any other port or ports in or not in any route to destination and/or return to the port of shipment once or oftener backwards or forwards in or not in any order or rotation, retaining the goods on board or discharging the same at risk and expense of the owners thereof at port of shipment or elsewhere at the first or any subsequent call, and shall thereupon be relieved of all responsibility in respect thereof, and full bill of lading freight, extra compensation for any additional service, and any extra expense occasioned thereby shall be paid by shipper, consignee and/or assigns, and shall constitute a lien on the goods and the vessel is privileged to carry any cargo not excepting contraband; and the Vessel shall have liberty in any circumstances to comply with any orders or requests of the Government of the United States or of Great Britain, its allies, or any insurance or other department or bureau or agency thereof or of any person purporting to act with the authority of any such government or department, bureau or agency.

18 29. The Shipper, Vessel, Consignee, Destination and Goods Referred to overpage as mentioned or described on this side (back) hereon are as follows:

Shipper, A. W. Pidwell.
Vessel, Allanwilde.
Destination of the Goods, Rochefort, France.
Consignee A. W. Pidwell, 23 Boulevard Naleschcrbes, Paris, France.

*Shipper's Description of Goods.*

(Carrier's Responsibility for Description Being Limited, as Hereinbefore Provided.)

| Marks. | Quantities. | Class and contents of packages. | Shipper's weight, pounds. | Rate. | Steamship freight. |
|---|---|---|---|---|---|
| One head Painted Black. | 1871 | Kegs Wire Nails | 200,197 | $35 per ton. | |

Non negotiable copy.

30. And finally in accepting this Bill of Lading the shipper, owner and consignee of the Goods and holder of this bill of lading agree to be bound by all its provisions, on this page and overpage, whether written, printed or stamped, as fully as if signed by all of them.

In witness whereof Allanwilde Transport Corporation by its agent has signed this Bill of Lading.

Dated at New York, August 15, 1917.

ALLANWILDE TRANSPORT CORPORATION,
By LYALL DEAN, *Treas.*

| | |
|---|---|
| Total Steamship Freight | ..... |
| Landing Charges— | |
| At 2½c. 100 | ..... |
| At 1c. cu. ft. | ..... |
| Revenue Stamp | ..... |
| Inland Freight | ..... |
| Cartage | ..... |
| Insurance premium | ..... |
| Attendance Fee | ..... |
| Total | ..... |
| Collection Fee 2% | ..... |
| Total | ..... |

U. S. Currency prepayable $3,128.08.

Endorsed: No. 2337. Questions Certified to Supreme Court for decision. Received and filed April 23, 1918. Saunders Lewis, Jr., Clerk.

19 UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania,*
*Third Judicial Circuit, sct:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original questions certified by this Court to the Supreme Court, U. S., in the cases of Allanwilde Transport Corporation Appellant, vs. Vacuum Oil Company, Appellee, and Allanwilde Transport Corporation, Appellant, vs. A. W. Pidwell, Appellee, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this second day of May, in the year of our Lord one thousand nine hundred and

eighteen, and of the Independence of the United States the one hundred and forty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

Endorsed on cover: File No. 26,510. U. S. Circuit Court Appeals, 3d Circuit. Term No. 449. Allanwilde Transport Corporation vs. Vacuum Oil Company. File No. 26,511. Term No. 450. Allanwilde Transport Corporation vs. A. W. Pidwell. (Certificate.) Filed May 15th, 1918. File Nos. 26,510 and 26,511.

# Supreme Court of the United States

OCTOBER TERM, 1918.

VACUUM OIL COMPANY,
Libelant-Appellee,

against

The Sailing Vessel *Allanwilde*,
ALLANWILDE TRANSPORT CORPORATION,
Claimant-Appellant.

---

A. W. PIDWELL,
Libelant-Appellee,

against

The Sailing Vessel *Allanwilde*,
ALLANWILDE TRANSPORT CORPORATION,
Claimant-Appellant.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

## Motion to Advance Cases.

The petition of Allanwilde Transport Corporation, a New York corporation, in which petition the libelants join, respectfully shows as follows:

## Statement.

1. The above two suits in admiralty come before this Honorable Court upon questions certified by the Circuit Court of Appeals for the Third Circuit after argument and submission of the cases to that Court and without prior request of the parties.

2. The two suits arose out of shipments made at the same time upon the same vessel. They were tried and decided together by the District Court, and were argued together before the Circuit Court of Appeals and by that Court together certified to this Honorable Court.

3. The alleged causes of action arose by reason of the order of the United States Government effective September 28, 1917, forbidding clearance to American sailing vessels bound for the war zone. The freight upon libelants' shipments had been prepaid and the *Allanwilde* had set out upon her voyage before September 28th, but subsequently, after suffering damage in heavy weather, returned to New York for repairs and was refused a second clearance by reason of said Government order. Thereupon the vessel abandoned the voyage while retaining the prepaid freight. The facts are more fully but concisely stated in the certificate from the Circuit Court of Appeals to this Court, a copy of which, exclusive of the exhibits, is hereto annexed, marked Exhibit A.

4. The present cases involve substantially no controversies of fact. The brief certificate of the Circuit Court of Appeals presents the facts of the two cases sufficiently to enable this Court to reach its decision.

**Reasons for Requesting a Preference.**

1. The questions presented for decision by the certificate of the Circuit Court of Appeals are concise questions of law not involving any disputes of fact or examination of testimony.

2. The present cases will probably serve as test cases for innumerable other controversies already pending or about to be brought in the lower Courts.

According to the information and belief of your petitioners, at the time the regulation prohibiting the clearance of American sailing vessels for the war zone went into effect more than thirty American sailing vessels were lying in the harbor of New York alone loaded or in the course of loading for the war zone. Freight upon many of the shipments by these vessels had been prepaid before the regulation was announced. In many other ports upon the Atlantic coast similar situations existed.

The attorneys for your petitioners have had an exceptionally large number of inquiries regarding the situation of the present cases and requests for copies of their briefs by firms of attorneys who stated that they had similar questions under advisement or in litigation. The attorneys for your petitioners have other cases actually in litigation which involve similar questions and are likely to be determined by the decision of this Honorable Court in the present cases.

In the Southern and Eastern District Courts of New York decisions have been rendered in two cases relating to the same sailing vessel, the *Gracie D. Chambers*, against which libels were filed by shippers to recover freight prepaid before the Governmental regulation of September 28, 1917. The decisions of the two District Courts were opposed, the District Court for the Eastern District of New York

dismissing the libel, whereas the District Court for the Southern District retained the libel and granted a decree for the amount of the prepaid freight. The decision of the latter Court has been reversed by the Circuit Court of Appeals for the Second Circuit and a writ of certiorari has been granted by this Honorable Court to the libelant, whose case is now pending here.

Another case arising under the regulation of September 28, 1917, is known by your petitioners to have been brought and to be pending in the District Court of Florida.

3. The Clerk of the Circuit Court of Appeals for the Third Circuit, in notifying your petitioners of the certification by that Court of the present cases to this Honorable Court, stated the views of that Court in the following language:

> "Our Court regards this matter as being one of considerable importance, extending even beyond the immediate case in hand, and are, therefore, anxious to get the matter before the Supreme Court as soon as possible."

4. In view of the exceptionally simple manner in which the important questions involved in the present cases are herein presented to this Court for consideration, it is respectfully submitted that an early hearing of the present cases will put at rest a great mass of controversies and litigations without seriously delaying the cases of other litigants that are before this Court.

WHEREFORE, the petitioners respectfully pray that this Honorable Court will grant their motion to advance the above cases on the calendar of this Honorable Court because of the general importance

and public interest of the questions involved, and that if possible the cases be advanced to the foot of the calendar of October 14, 1918.

Respectfully submitted,

OSCAR D. DUNCAN,
RUSSELL T. MOUNT,
COURTLAND PALMER,
Counsel for Sailing Vessel *Allanwilde*
and Allanwilde Transport Corporation.

I join in the foregoing petition and prayer.

Respectfully submitted,

JOHN C. PRIZER,
Of Counsel for Vacuum Oil Company
and A. W. Pidwell, Libelants.

## Exhibit A.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

March Term, 1918.

No. 2337—No. 2387.

The
*Allanwilde.*

Appeals by the Allanwilde Transport Corporation, Claimant-appellant, from decree of the District Court of the United States for the District of New Jersey.

IN ADMIRALTY.

Before BUFFINGTON, MCPHERSON and WOOLLEY, Circuit Judges.

In order that the pending appeals may be properly decided, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court upon the questions or propositions of law hereafter stated. The questions arise upon the following facts:

On Nov. 1, 1917, the American schooner *Allanwilde* was seized under two libels *in rem* filed in the United States District Court for the District of New Jersey. Each libelant obtained a decree, and

on Dec. 14 the vessel was sold, the proceeds being now in the registry of the court. The Allanwilde Transport Corporation was the owner of the vessel, and the libelants were the Vacuum Oil Co. and A. W. Pidwell respectively, each of whom had shipped certain goods to be carried from New York to Rochefort, France. In some respects the contracts of shipment vary, the difference being as follows:

In May, 1917, the Oil Co. chartered the vessel for a voyage from New York to Genoa (afterward changed to Rochefort) to carry a cargo of oil in barrels at the rate of $16.25 per barrel (afterward changed by agreement to 15.25). The charter-party contained *inter alia* the following proposiion:

> "* * * freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission, or insurance. Freight earned, retained and irrevocable, vessel lost or not lost."

A full copy of the charter-party is attached hereto and made part hereof. On Aug. 25, the oil having been loaded, the vessel issued a bill of lading containing *inter alia* the following provision: "All conditions and exceptions of charter-party are to be considered as embodied in this bill of lading." A copy of the bill is attached hereto and made a part hereof.

The other libelant, A. W. Pidwell, was permitted to ship certain kegs of wire nails on the vessel, and on Aug. 15 a bill of lading was issued to him, of which a full copy is attached hereto and made a part hereof. *Inter alia* the bill provided as follows:

> "11. The carrier shall not be liable as carrier or otherwise for any loss, damage, delay,

or default, whether occuring during transit or before or after or during or while awaiting loading, transshipment, discharge, delivery or other disposition of the goods, or on board or in lighters or craft or on wharf or in warehouse at any port of place, occasioned by any of the following excepted causes, throughout this contract always excepted: By causes beyond the carrier's reasonable control; * * * by arrest or restraint of governments, princes, rulers or peoples; * * * by proclamation of the voyage; * * *."

Paragraph 5 of the bill is in part as follows:

"5. Full freight to destination, whether intended to be prepaid or collect at destination and all advance charges against the goods are due and payable to (the Allanwilde Transport Corporation) upon receipt of the goods by the latter; and the same and any further sums becoming payable to the carrier hereunder, and extra compensation, demurrage forwarding charges, general average claims, and any payments made and liability incurred by the carrier in respect of the goods (not required hereunder to be borne by the carrier) shall be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service hereunder without deduction (if unpaid), or refund in whole or in part (if unpaid), goods or vessel lost or not lost, or if the voyage be broken up; and shall be payable in United States currency and in New York funds; and the carrier shall have a lien on the goods therefor (whether payable in advance or not, and though noted hereon as prepaid) sur-

viving delivery, and in case of loss of any part of the goods shall have a lien on the goods or any part or proceeds for the whole thereof; and the shipper, consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding any liens therefor as been surrendered. * * * If there be an enforced interruption or abandonment of the voyage at any port of distress or elsewhere, and the goods or any part be forwarded, the cost thereof, including extra compensation, if performed by vessels in the service of the carrier, shall be paid by shipper, consignee and/or assigns."

In pursuance of the contracts thus evidenced, the oil and the nails were shipped on the *Allanwilde* and the freight was paid in advance—$49,745.50 for the oil and $3128 for nails.

On September 11 the vessel cleared from New York and set sail for Rochefort. The vessel was seaworthy, and was properly manned and equipped. After she had been out 14 days, and was 500 miles from New York, she encountered a storm so severe that her boats were carried away and she sprang a leak so threatening that the water in her hold was 3 or 4 feet deep and was gaining on the pumps. Thereupon the master properly decided that he must seek a port of refuge for safety and repair. Halifax also was about 500 miles away, but in that direction the wind was against him, while it was favorable for New York, and on this account as well as for other reasons he headed for New York where he arrived on Oct. 5, having been 24 days. Repairs were undertaken at once, the cargo remaining on board meanwhile.

On Sep. 28, while the vessel was at sea, the government decided to refuse clearance thereafter to

any sailing vessel bound for the war zone, as will appear from the Instructions and the Official Bulletin, copies of which are attached hereto and made part hereof. The master did not know of this decision until the vessel returned to New York; he received no information from the shore after Sept. 11. The repairs having been finished, the vessel attempted to resume her voyage, but clearance was refused, and none could be obtained in spite of her efforts to induce the government to modify its stand. Toward the end of October the shippers were notified to unload their goods, and this they did, but under protest and reserving their rights. Afterwards, the oil was forwarded by steamship, but at a higher rate of freight and under other charges. What became of the nails after they were unloaded does not appear. The vessel declined to refund the freight to either shipper, and the libels were filed to recover not only the prepaid freight, but also damages for failure to carry. On each libel the district court entered a decree for the prepaid freight alone, refusing recovery for the damages.

Under the foregoing facts the Court of Appeals desires instruction on the following questions:

1. Was the adventure frustrated, and was the contract evidenced by the charter-party and by the bill of lading issued to the Oil Co. dissolved, so as to relieve the carrier from further obligation to carry the oil?

2. Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

3. Was the adventure frustrated, and was the contract evidenced by the bill of lading issued to Pidwell dissolved, so as to relieve the carrier from further obligation to carry the nails?

4. Whatever answer may be given to the third question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

JOS. BUFFINGTON,
JOHN B. McPHERSON,
VICTOR B. WOOLLEY,
*Circuit Judges.*

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# Supreme Court of the United States

OCTOBER TERM, 1918.

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ALLANWILDE TRANSPORT CORPORATION,
Claimant-Appellant,

vs.

VACUUM OIL COMPANY,
Libelant-Appellee.

---

ALLANWILDE TRANSPORT CORPORATION,
Claimant-Appellant,

vs.

A. W. PIDWELL,
Libelant-Appellee.

---

## BRIEF ON BEHALF OF CLAIMANT-APPELLANT.

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### Statement.

In May, 1917, the Vacuum Oil Company chartered the sailing vessel *Allanwilde* for a voyage from New York to Rochefort, France, to carry oil in barrels at the rate of $15.25 per barrel. The

charter-party contained *inter alia* the following provisions:

> "* * * freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission or insurance. Freight earned, retained and irrevocable, vessel lost or not lost."

On August 25th, the oil having been loaded aboard the vessel, a bill of lading was issued, containing *inter alia* the following provision:

> "All conditions and exceptions of charter-party are to be considered as embodied in this bill of lading."

The other libelant, A. W. Pidwell, shipped certain kegs of wire nails on the vessel, and on August 15th a bill of lading was issued, which *inter alia* provided in substance as follows:

> 5. Full freight to destination is due and payable upon receipt of the goods, shall be deemed fully earned and due and payable to the carrier at any stage, before or after loading, without refund, goods or vessel lost or not lost or if voyage be broken up.
>
> * * * * * *
>
> 10. If, by reason of war, the vessel is prevented from making delivery, the goods may be discharged and full freight is payable.
>
> * * * * * *
>
> 28. It is mutually agreed that this shipment is at the sole risk of the owners of all risks of war, arrests, restraints, detention and the vessel shall have liberty to return to the port of shipment, discharging goods at the risk and expense of owners and full bill of lading freight shall be paid by shipper.

On September 11, 1917, the *Allanwilde* cleared from New York and set sail for Rochefort, France. The vessel was seaworthy and was properly manned and equipped. After she had been out for fourteen days and was about 500 miles from New York, she encountered a storm so severe that her master, because leaks had sprung, decided that he must seek a port of refuge for safety and repair. He headed for New York, on account of favorable winds, where he arrived on October 5th, having been out twenty-four days. Repairs were undertaken at once, the cargo remaining on board meanwhile. On September 28th, while the vessel was at sea, the Government decided to refuse clearance thereafter to any sailing vessel bound for the War Zone, as will appear from the Instructions (p. 6, fol. 8), the Official Bulletin (p. 7, fol. 8) of the Certificate, and Appendix I of this brief. The master did not know of this decision until the vessel returned to New York; he received no information from the shore after September 11th. The repairs having been finished, the vessel attempted to resume her voyage, but clearance was refused, and none could be obtained in spite of her efforts to induce the Government to modify its stand. Toward the end of October the shippers were notified by the carrier to unload their goods, and this they did, but under protest and reserving their rights. Afterwards the oil was forwarded by steamship, but at a higher rate of freight and under other charges. It does not appear what became of the nails. The vessel declined to refund the freight to either shipper, and the libels were filed to recover not only the prepaid freight, but also damages for failure to carry. On each libel the District Court entered a decree for the prepaid

freight alone, refusing recovery for the other damages (Certificate, pp. 2 and 3, fols. 3 and 4).

The Circuit Court of Appeals certifies four questions upon which it desires the instruction of this Court, as follows:

> "1. Was the adventure frustrated, and was the contract evidenced by the charter-party and by the bill of lading issued to the oil company dissolved, so as to relieve the carrier from further obligation to carry the oil?
>
> 2. Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund prepaid freight?
>
> 3. Was the adventure frustrated, and was the contract evidenced by the bill of lading issued to Pidwell dissolved, so as to relieve the carrier from further obligation to carry the nails?
>
> 4. Whatever answer may be given to the third question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?"

As the principles of law involved in questions 1 and 3, dealing with the frustration of adventure, are identical, these two questions will be considered under Point I, "Was the Adventure Frustrated, Was the Contract Dissolved?"

As the principles of law involved in questions 2 and 4 are identical, they will be treated under Point II, "Advance Freight."

## POINT I.

### Was the adventure frustrated and was the contract dissolved?

The doctrine of frustration of adventure is, properly speaking, one form of discharge of contracts by events happening subsequent to their inception.

> "That there is no such doctrine, properly indicated by the phrase 'frustration of the commercial purpose of the adventure' in regard to the dissolution of commercial contracts, but only the particular application of the principle of discharge of all contracts under the general doctrine, has been emphasized in recent discussions in the courts. 'When this question arises in regard to commercial contracts * * * the principle is the same, and the language used as to "frustration of adventure" merely adapts it to the class of cases in hand.' (Lord Loreburn, *Tamplin* v. *Anglo-Mexican Co.* [1916], 2 App. Cas., at p. 404. See also Speech of Lord Atkinson in *Horlock* v. *Beal* [1916], 1 App. Cases, at p. 495.)" F. D. McKinnon, *Pamphlet on Effect of War on Contracts,* Oxford, 1917.

This is equally true of maritime as well as non-maritime contracts and no distinction should be made, as the doctrine of impossibility of performance applies equally to all kinds of contracts.

The whole question, then, resolves itself into a consideration of

THE DOCTRINE OF DISCHARGE OF CONTRACTS BY IMPOSSIBILITY OF PERFORMANCE.

Under what circumstances can a contract be discharged?

Sir William Anson, in his work *Principles of the English Law of Contracts*, 14th Ed., p. 330, says, in Part 5, "The Discharge of Contracts," the obligations of a contract may be dissolved in five ways:

"(1) By agreement.
(2) By performance.
(3) By breach.
(4) By impossibility of performance.
(5) By operation of law."

In considering the effect of the war on contracts, we are concerned only with the first and fourth. Under the latter head Anson also includes the impossibility caused by a subsequent change in the law of one's country, making the performance of the contract illegal.

The primary rule as to impossibility of performance, as laid down by Anson, is "that supervening impossibility of performance does not excuse the promisor if he has made his promise unconditionally." This rule is based upon the leading case of *Paradin* v. *Jane* (1647), Aleyn, 26, where, to an action of debt for rent, the defendant pleaded that an enemy to the King had invaded the realm with a hostile army and with the same force had entered upon the defendant's possession and expelled and held him out of possession, and whereby he could not take profits. On demurrer the plea was held bad, and it was said "that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. But when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

All of the authorities supporting the primary rule as thus announced down to the present time are based upon this old common law case, which is typical of the rigidity of the common law and its strictness in enforcing contractual obligations.

In the development of the principles underlying the law of contracts this primary rule has had exceptions engrafted upon it, or, as we would prefer to call it, has had the "rule of reason" applied to it, so as to make the contract more consonant with the intention of the parties. It will be convenient to consider these exceptions, or rather the development of the doctrine of discharge of contracts by impossibility of performance, under the following heads, to wit:

1. Where a contract for personal services is excused by the death or physical disability of the promisor.

2. Where the subject-matter of the contract or something essential for its performance is destroyed.

3. Where circumstances, of which the parties must have regarded the continued existence as essential to performance, ceased to exist, including a subsequent change in the law rendering further performance of the contract illegal.

We will consider these three subdivisions *seriatim.*

## FIRST.

WHERE A CONTRACT FOR PERSONAL SERVICES IS EXCUSED BY THE DEATH OR PHYSICAL DISABILITY OF THE PROMISOR.

This doctrine is so clearly established that we will content ourselves with the citation of the cases and the reason therefor

*Boast* v. *Firth*, L. R., 4 C. P., 1.
*Robinson* v. *Davidson*, L. R., 6 Ex., 269.
*Whincup* v. *Hughes*, L. R., 6 C. P., 78.
*Poussard* v. *Spiers* (1876), L. R., 1 Q. B. D., 410.
*Johnson* v. *Walker*, 155 Mass., 253.
*Spalding* v. *Rosa*, 71 N. Y., 40.
*Lacy* v. *Getman*, 119 N. Y., 109.
*Scully* v. *Kirkpatrick*, 79 Penn. St., 324.
*People* v. *Globe Mutual Life Ins. Co.*, 91 N. Y., 174.

In *Spalding* v. *Rosa*, *supra*, the reason given at page 44 is:

> "Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract, as one of the conditions of the contract. Contracts for personal services are subject to this *implied condition*, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished." (Italics ours.)

## SECOND.

WHERE THE SUBJECT-MATTER OF THE CONTRACT OR SOMETHING ESSENTIAL FOR ITS PERFORMANCE IS DESTROYED.

The cases supporting this doctrine are as follows:

*Taylor* v. *Caldwell*, 3 Best & Smith, 826, approved by this Court in *The Kronprinzessen Cecilie*, 244 U. S., 12.
*Appleby* v. *Myers* (1867), L. R., 2 C. P., 651.
*Walker* v. *Tucker*, 70 Ills., 527.
*Field* v. *Breckett*, 56 Me., 121.
*Thomas* v. *Knowles*, 128 Mass., 22.
*Johnson* v. *Lyon*, 75 Mich., 477.
*Dexter* v. *Norton*, 47 N. Y., 62.
*Western Hardware Co.* v. *Bancroft*, 116 Fed. Rep., 176 (53 C. C. A., 548).

In the case of *The Tornado*, 108 U. S., 342, a contract of affreightment was held to be dissolved where a ship which was loading with cargo caught fire at the pier and was sunk before she had "broken ground." The Court said, at page 349:

> "We are of opinion that by the disaster which occurred before the ship had broken ground or commenced to earn freight, the circumstances with reference to which the contract of affreightment was entered into *were so altered by the supervening occurrences, which it cannot be contended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability under the contract of affreightment.*" (Italics ours.)

Page 351:

> "In *Taylor* v. *Caldwell*, 3 Best & Smith, 826, it is laid down as a rule that in contracts in which the performance depends on the continued existence of a given person or thing, *a condition is implied*, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance! The reason given for the rule is that without 'any express stipulation that the destruction of the person or thing shall excuse the performance,' 'that excuse is by law implied, because, from the nature of the contract, it is apparent that *the parties contracted on the basis of the continued existence of the particular person or chattel.*' The rule was there applied to excuse the owner of a music hall, which had been burned, from fulfilling a contract to let the use of it." (Italics ours.)

The so-called "Coronation Cases" are an excellent illustration of this doctrine.

See:

*Krell* v. *Henry* [1903], 2 K. B., 740.

The underlying reason for the discharge of this class of contracts is the failure of something which was at the basis of the contract in the minds and intention of the contracting parties. Both parties looked to the fulfillment and not to the dissolution of the inherent purposes of the contract. The reason for the dissolution of the contract is that there is an implied condition that the thing essential to performance, which each party had supposed would exist, shall continue in existence, or the contract will be dissolved.

> "The reasons generally given for excusing performance in these two classes of cases is

that continued physical ability or the continued existence of the subject-matter to which the contract relates is an implied term or condition of the contract, or, as expressed by Shanswood, *J.*, in *Scully* v. *Kirkpatrick*, 79 Penn. St., 324, 332, the Court 'will imply that the parties necessarily intended an exception.'" 2 *Parsons on Contracts*, 826, Note, 9th Ed (1904), by John Gould.

## THIRD.

WHERE CIRCUMSTANCES SUPERVENE WHICH RENDER PERFORMANCE OF THE CONTRACT IN THE MANNER, OR IN THE TIME, CONTEMPLATED BY BOTH PARTIES IMPOSSIBLE.

*Geipel* v. *Smith* (1872), L. R., 7 Q. B., 404.
*Jackson* v. *Union Marine Co.* (1874), L. R., 10 C. P., 125.
*Baily* v. *De Crespigny* (1869), L. R., 4 Q. B., 180.
*Krell* v. *Henry* [1903], 2 K. B., 740.

This rule is variously expressed.

The Court of Appeal (England), by Lord Justice Eady, says:

> "In my judgment the charter-party must be taken to have been entered into under the implied condition that, if supervening events (not due to the default of either party) render performance of the 'Baltic Round' indefinitely impossible, the contract should be deemed to be dissolved." *Scottish Navigation Co.* v. *Souter* [1917] 1 K. B., 222, 237.

> "That some forms of impossibility are allowed to excuse performance because neither party can reasonably be supposed to have

> contemplated their occurrence so that the promisor neither excepts them specifically nor promises unconditionally in respect of them." *Anson on Contracts,* 14 Ed., p. 384.

And this Court said in the case of *The Kronprinzessen Cecilie,* 244 U. S., 12:

> "The seeming absolute confinement to the words of an express contract has been mitigated so far as to exclude from the risks of contract for conduct * * * some, at least, which, if they had been dealt with it cannot be believed that the contractee would have demanded or the contractor assumed."

And also in

*Chicago, Milwaukee & St. Paul Ry.* v *Hoyt,* 149 U. S., 1, 15:

> "But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

For the sake of convenience we will divide this point into two parts:

A. Supervening illegality; and
B. Supervening impossibility.

A.

*Supervening Illegality.*

The first part of this question deals with a situation where an act, legal when contracted for, subsequently becomes illegal, and the promisor is pre-

vented from fulfilling his contract. The leading case on this subject is *Baily* v. *De Crespigny* (1869), L. R., 4 Q. B., 180, cited and approved by this Court in *The Kronprinzessen Cecilie*, 244 U. S., 12, 21; also see *Jones* v. *Judd*, 4 N. Y., 412.

In 2 *Parsons on Contracts*, 827, 9th Ed., by John M. Gould (1904), the rule is stated as follows:

> "That the illegality of a contract is in general a perfect defense, must be too obvious to need illustration. It may, indeed, be regarded as an impossibility by act of law; and it is put on the same footing as an impossibility by act of God; because it would be absurd for the law to punish a man for not doing, or, in other words, to require him to do, that which it forbids his doing.
>
> Therefore, if one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the Legislature, the act avoids the promise * * *."

The reason given for the rule being that there is an implied condition in the contract that the performance shall continue to be legal.

The case of *Baily* v. *De Crespigny* (*supra*) was in reality one where performance of a contract became impossible, not by reason of a mere change of circumstances or fact, but of direct legal intervention. A lessor had entered into a covenant, for himself and his assigns, not to permit any building to be erected on certain land fronting the demised premises, and a railroad company, who had acquired this land by assignment under compulsory powers, had erected certain station buildings upon it, though only empowered and not compelled to do so. An Act of Parliament which intervened here took away from both parties part of the actual subject matter of the contract. It was a real case

of impossibility of performance of a contract in law, and the effect was the same as if legislation had prohibited the performance altogether—an event which had been recognized nearly two centuries before (*Brewster* v. *Kitchell* (1697), 1 Salk, 198), and would have furnished a complete answer to an action in covenant on the ground of illegality. The Court of Queens Bench, however, did not rest its decision on this fact, but on the ground of a radical change of circumstances in the position of the contracting parties, and the statement of the Court, as follows, has become a classical quotation on the law of impossibility of performance:

> "But when the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used in reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the Act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate explanation, because where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the Act of God, what is meant is that it was not within the contract."

In the present case it was not only physically impossible to sail the vessel, as the customs authorities of the Government would prohibit same, should it have been attempted, by the use of revenue cutters and naval cruisers, but it was also *illegal* to perform the contract or to sail after the clearance was refused.

See R. S., 4197 to 4201, inclusive, as amended April 19, 1902, and General Rules No. 1, War Trade Board (attached to this brief as ~~an exhibit~~ Appendix I).

It is clear in this case that the governmental order prohibiting the sailing of the vessel, and the Government's refusal to grant her clearance, rendered the performance of the contract *illegal* and released the carrier from any further performance and dissolved the contract.

B.

*Supervening Impossibility.*

There appears to be an essential distinction between the two classes of cases here spoken of. Where excuse from performance of a contract is claimed by reason of the mere change of circumstance, it must always be shown, and, of course, with strictness, that the change is one which goes to the very foundation of the contract, while in the case of Government intervention there is the additional point that further performance of the contract is often actually forbidden, and consequently to be excused on the ground of illegality.

We are here concerned with the case which goes to the very foundation of the contract, or, as it has been termed, "frustrates the adventure."

A very familiar illustration of the rule of frustration of adventure is contained in the cases where a ship has become so damaged that her repairs will take an altogether unreasonable time, thereby rendering the contract impossible in a commercial sense.

See:

*Jackson* v. *Union Marine Co.* (1874), L. R., 10 P. C., 125.

*Bork* v. *Norton* (C. C., 7th Cir., 1841), 2 McLean, 422.

*Bensaude et al.* v. *Thames & Mersey Mar. Ins. Co.* [1897] A. C., 609.

*The Spartan* (D. C., S. D., N. Y., 1885), 25 Fed. Rep., 44.

*Guiseppe* v. *Mfgrs. Export Co.* (1903, D. C., S. D., Ala.), 124 Fed. Rep., 663; delay of four months.

*Adler* v. *Galbraith Bacon & Co.* (1907, D. C., W. D., Wash.), 156 Fed. Rep., 259.

*Other Cases of Impossibility.*

It has been held in the case of *Buffalo Land Co.* v. *Bellevue Co.*, 165 N. Y., 247, 253, where the vendor of land as a part consideration of its sale agreed to construct an electric street railroad and to run cars thereon "as often as once every half hour," and was prevented from doing so on certain days during the winter by severe snowstorms; that the vendor had not violated or breached the contract, the interruptions not being due to any omission on the part of the vendor. The Court gave as its reason for the decision that "neither party intended to be bound to do things that were impossible."

In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Hoyt,* 149 U. S., 1, 15, the plaintiffs sued the railroad company for failure to deliver a minimum amount of five million bushels of grain per annum, agreed to be delivered by the railroad and received by the plaintiffs at their elevators, "to the extent

and capacity of such elevators." The railroad company delivered less than the minimum amount (although it tendered more than that amount) because the plaintiffs refused to receive it, claiming that the entire storage capacity was constantly occupied, and it was impossible to deliver more. Mr. Justice Jackson, writing the opinion for the Court, said, after stating the general rule that an unqualified contract must be performed,

> "but where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens,"

and held that it was not the intention of the contracting parties that the railroad company would guarantee that the shippers having grain stored there would remove it so as to enable the elevators to store and handle the five million bushels, saying that the contract "should not be so extended to cover the contingency or possibility of such a course of dealing as would prevent the acceptance of grain if the agreed quantity was tendered."

In *The Kronprinzessen Cecilie,* 244 U. S., 12, where a German ship was prevented by the imminence of war and her consequent seizure from completing her contract of carriage and was sued for damages for failure to deliver kegs of gold, it was held that she was not liable for damages, as such prevention was not within the intention of the parties, the Court saying:

"The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradin* v. *Jane*, Aleyn 26, has been mitigated so far as to exclude from the risks of contract for conduct (other than the transfer of fungibles like money) some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. *Baily* v. *De Crespigny*, L. R., 4 Q. B., 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing *Taylor* v. *Caldwell*, 3 Best & Smith, 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. *Lakeman* v. *Pollard*, 43 Maine, 463. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England, there can be no doubt that it would have been warranted in turning back. See *Mitsui & Co., Limited*, v. *Watts, Watts & Co., Limited* [1916], 2 K. B., 826, 845. *The Styria*, 186 U. S., 1. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. *The Teutonia*, L. R., 4 P. C., 171. *The San Roman*, L. R., 4 P. C., 307.

* * * * * *

It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by in-

> telligent men of affairs. The case of *The Styria*, 186 U. S., 1, although not strictly in point, tends in the direction of the principles that we adopt."

The Circuit Court of Appeals for the Second Circuit, February 20, 1918, in the case of *Higgins* v. *Eros,* not yet reported, held, in a case where there were no exceptions excusing non-performance caused by acts of princes or other matters equivalent to declared hostilities, that if the yacht had actually been taken by order or requisition, "that governmental act would have been an excuse for declining to perform the terms of charter," and further saying:

> "It is thought that the recent ruling in *The Kronprinzessen Cecilie,* 244 U. S., 12, has mitigated the rigidity of contract sometimes inferred from the absence of the 'restraint of princes' clause."

In the case of *Day* v. *United States,* 245 U. S., 159, this Court say of the rule of impossibility of performance:

> "One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. *The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. The Kronprinzessen Cecilie,* 244 U. S., 12, 22. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent." (Italics ours.)

The above American cases establish very clearly the doctrine which is applicable to this case, but the question has arisen oftener in the English Courts, and the law in favor of the appellants as historically developed and existing to-day in those courts is conclusively settled in favor of the appellants.

The first and leading authority which is almost universally referred to on this topic is that of *Paradin* v. *Jane* (1647), Aleyn, 26. This was followed by the case of *Chesterfield* (*Lord*) v. *Boalton* (*Duke*), (1738), 2 Com., 627, where premises which had been demised with a covenant to repair were burnt down and the lessee resisted the claim for damages under the covenant, on the ground that repairing without rebuilding was impossible, but the Court held, relying on the first case, that he should in all events repair it, and if it were burnt or fell down he must rebuild it. It is clear from the statement of the Court, that "he should in all events repair it," that the doctrine of implied condition, which we are dealing with, had not as then made its appearance.

The next case, *Digby* v. *Atkinson* (1815), 4 Camp., 273, 275, followed the *Chesterfield* case, holding that the lessee must rebuild under a covenant to repair.

And, lastly, in the case of *Clark* v. *Glasgow Assurance Co.* (1854), 1 Macq., 668, a Scottish appeal, the House of Lords delivered its decision in accordance with the above authorities.

The doctrine stood thus until 1863, when a reaction set in with the case of *Taylor* v. *Caldwell* (1863), 3 B. & S., 826, where an important exception was engrafted upon the old rule. The principle was there laid down, which is still recognized to-day, that where performance of a contract depends upon the continued existence of a specific thing and it ceases to exist without any default on

the part of the promisor, performance will be excused on the ground that such continued existence is regarded in law as an implied term of the contract. The failure here spoken of does not necessarily import actual or complete failure, but failure sufficient for the purpose of substantially preventing a performance of the contract.

The next case arose in 1869, *Baily* v. *De Crespigny*, L. R., 4 Q. B., 180, which was in reality one where performance became impossible, not by reason of a mere change of circumstances or fact, but of direct legal intervention, and it was in this case that the oft-quoted passage above set out, and which has since been the basis of all the recent decisions on this branch of the law of contracts, was set forth. About this same time the doctrine of commercial frustration began to be recognized and assisted in the development of this principle of the law.

At the dawn of the present century a further advancement was made in this doctrine in the so-called "Coronation Cases." *Krell* v. *Henry* [1903], 2 K. B., 740. A number of contracts had been entered into for letting window spaces for the procession which had been organized on the occasion of the coronation of the late King Edward. Illness on his part supervened, necessitating a postponement of the ceremony, and a question arose as to the effect of this suppression upon the contracts which had been entered into for the stipulated day. The Courts held that the lessees were not liable on the ground that the change of the circumstances affecting the subject-matter went directly to the basis of the contract, stating that if "a state of things or condition" contained in the contract and essential to its performance should perish or fail, even if not expressed in the contract, then that it could not

reasonably be supposed to have been in their contemplation when the contract was made.

The latest cases applying these principles are the so-called "War Cases," starting with *Horlock* v. *Beal* [1916], 1 A. C., 486; the leading case of *Tamplin S. S. Co.* v. *Anglo-Mexican Pet. Products Co.* [1916], 2 A. C., 397, and *Metropolitan Water Board* v. *Dick Kerr & Co.* [1918], A. C., 119, follow:

1. In *Shipton, Anderson & Co.* v. *Harrison* [1915], 3 K. B., 676, owners of a specific parcel of wheat in warehouse at Liverpool, sold it on the terms "payment in cash within seven days against transfer order." Before delivery the parcel was requisitioned by His Majesty's Government. It was held that the contract was thereby dissolved and the sellers relieved of any obligation to deliver or to pay damages. Lord Chief Justice Reading based his decision on the ground that "the contract must be taken" * * * to be "subject always to the condition that if the Government requisition the goods and render it impossible for the sellers to perform their contract they should be excused from performance."

2. In the case of *Horlock & Beal* (House of Lords, 1916, 114 L. T. R., 193) [1916], 1 A. C., 486, a British ship, owned by the appellant, was in a German port when war was declared between the United Kingdom and the German Empire, and was detained by the German authorities, but no proceedings for her confiscation were known to have been instituted. Respondent's husband, a British seaman, had signed articles for the voyage. The ship and crew were still detained and imprisoned when the respondent brought her action, claiming an allotment of wages made her by her husband. Held,

that the shipowner was not liable to pay wages to the crew after and from the date it was impossible for them to render any services contemplated by the contract of service.

Lord Loreburn said, page 494:

> "In my opinion, neither party was any longer bound by that contract from that date. If they were bound, it must mean that wages were to be paid, without any service in return, for the entire duration of this war, or, in the present case, till the expiry of two years from the commencement of the service. The Napoleonic war, after the rupture of the Peace of Amiens, lasted for eleven years. *I think it was an implied term of this service, subject to any special law affecting seamen, that it would be practicable for the ship to sail on this voyage, in that sense which disregards minor interruptions, and takes notice only of what substantially ends the possibility of the service contemplated being fulfilled. Both employer and employed made their bargain on the footing that whatever temporary interruption might supervene, the ship and crew would be available to carry out the adventure.*" (Italics ours.)

3. In the case of

> Arbit. *F. A. Tamplin S. S. Co., Ltd.,* and *Anglo-Mexican Petroleum Products Co.*, 115 L. T., 315 (House of Lords, July 24, 1916), 2 A. C., 397,

by a charter-party dated in May, 1912, the owners agreed to let and the charterers agreed to hire the ship for a period of *five years*, which period would expire in December, 1917, to be employed in lawful trade on voyages between specified ports, for the carriage of petroleum. The ship was requisi-

tioned by the Government in December, 1914, and again in February, 1915, and the appellants claimed that the requisition by the Admiralty defeated the contract. The Court held that the charter-party having been for the period of five years, the interruption for the few months which the requisition would take would not operate to release both the charterers and owners from a time charter that was to last five years. Lords Atkinson and Parker, at pages 421 and 427, respectively say that if the requisition had been for the period of the charter it would frustrate the adventure, and Lord Loreburn says, page 403:

> "But a court can and ought to examine the contract and circumstances in which it was made, not, of course, to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. *And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract.* In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance *is such as to upset altogether the purpose of the contract.* Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree." * * * "Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is, in my opinion, the true principle, for

no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

When this question arises in regard to commercial contracts, as happened in *Dahl v. Nelson* (44 L. T. Rep., 381; 6 App. Cas., 38), *Geipel v. Smith* (26 L. T. Rep., 361) and *Jackson v. Union Marine Insurance Company* (31 L. T. Rep., 789; L. Rep., 10 C. P., 125), the principle is the same, and the language used as to 'frustration of the adventure' merely adapts it to the class of cases in hand. In all these three cases it was held, to use the language of Lord Blackburn, '*that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at end.*' That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'if that happens, of course it is all over between us'? What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end?" (Italics ours.)

4. The cases of

*Scottish Navigation Co., Ltd.*, v. *W. A. Souter & Co.*, and
*Admiral Shipping Co.* v. *Weidner, Hopkin & Co.*, 115 L. T., 812 (C. A., Nov. 17, 1916) [1917], 1 K. B., 222, 236,

both involving practically the same point of law, were heard together. In the first case the shipowners by a charter-party let the steamer to the charterers for "one Baltic round," and in the second case the voyage was for "two Baltic rounds." The Court construed the charter-party as voyage charters, although they were headed "Time Charters." While the ships were loading at a Baltic port war broke out, and they were not allowed by the Russian authorities to leave the Baltic. It was held in a very learned opinion by Swinfen Eady, *L. J.*, that the ADVENTURE WAS FRUSTRATED, and that no charter hire was due. Lord Justice Eady said, at page 236:

> "In my judgment the principle upon which this case falls to be determined is *that both parties contemplated from the first a mercantile adventure*—a Baltic round; a voyage to the Baltic and back again to be paid for according to the time occupied—*and that the enforced delay by reason of the war is of such long and indefinite duration as completely to frustrate the adventure in a mercantile sense, and that the original contract is thereby determined and cannot be enforced.* The 'Baltic round' which is the subject of the adventure is quite impracticable in a commercial sense. It is not a case in which the charterers have bound themselves absolutely and in any extent to continue to pay the hire until the ship is re-

stored to the owners. If that were so, they would continue liable to make the monthly payment of 975 £, for an indefinite period.

"Paraphrasing the language of Lord Loreburn in *Horlock* v. *Beal, I think it was an implied term of this charter-party that it should be practicable for this ship to sail on this voyage,* in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the contemplated adventure being carried out. Both shipowner and charterer made their bargain on the footing that, whatever temporary interruption might supervene, the ship and crew would be available to carry out the adventure of a Baltic round. The further performance of the contract contained in the charter-party became impossible upon the ship being detained for a long and indefinite period. It was urged that here there was no impossibility, as all that the charterers had to do was to continue to pay the monthly hire, and the detention of the ship did not render that impossible. The same argument would have equally applied in *Horlock* v. *Beal* in the claim for seamen's wages—namely, that the detention of the ship did not prevent the owners from paying the amount of the allotment note, which was all that the plaintiff there claimed. *It is the further performance of the contract by one party which formed the consideration for the payment by the other, which has become impossible, and this effects a dissolution of the contract.*

"It was contended that the charter-party in the present case contained a clause providing for the cesser of hire under certain circumstances, and that the effect of such a clause was to exclude any implication that the hire might cease under other circumstances. The answer to this argument *is that the effect of what has happened is not*

*merely to suspend liability to pay hire, but to dissolve the contract,* and accordingly there is no longer any subsisting contract under which hire is payable.

*"In my judgment the charter-party must be taken to have been entered into under the implied condition that, if supervening events (not due to the default of either party) rendered the performance of the 'Baltic round' indefinitely impossible, the contract should be deemed to be dissolved.* See *Geipel* v. *Smith* (1872), L. R., 7 Q. B., 404; and *Horlock* v. *Beal* [1916], 1 A. C., 486. Here a contract has been entered into which by a supervening cause beyond the control of either party has become impossible or impracticable in a commercial sense, and the charterers have not, according to the true construction of the written contract, expressly taken upon themselves the risk of such a supervening cause; upon the occurrence of that cause both parties were and are excused from any further performance." (Italics ours.)

5. In the case of

*Anglo-Northern Trading Co., Ltd.,* v. *Emlyn, Jones & Williams,* 116 L. T., 414 (King's Bench Division, March 30) [1917], 2 K. B., 78; affirmed by Court of Appeal, 118 L. T., 196,

by a charter-party dated the 2nd of October, 1915, a ship was let on hire at a monthly rate until the 19th of November, 1916. On the 2nd of July, 1916, the ship was requisitioned by the Admiralty and continued until after the expiration of the charter-party. It was contended for the charterers that the requisition had frustrated the adventure and they were not liable for the hire after the date of requisition. It was held, after reviewing the previous

case of the House of Lords above cited and others on the doctrine of frustration of adventure, *that the requisition was "for an undefined period" frustrated the adventure, and dissolved the contract and there was no further liability to pay hire.*

6. In *E. Hulton & Co., Ltd.*, v. *Chadwick and Taylor, Ltd.* (1917), 33 T. L. R., 363, the defendants by contracts in 1913 and in April, 1914, agreed to supply the plaintiffs with paper during the years 1914 to 1916. In March, 1916, regulations made by the paper commission restricted the quantity of paper that buyers might receive to two-thirds of that supplied to them in 1914.

In an action for damages for breach of the contracts, *held*, that no recovery could be had as the regulations of the paper commission had made performance impossible, because delivery of two-thirds was not performance of a contract to deliver the whole amount contracted for.

7. An analogous case is *Lloyd Belge So.* v. *Stathatos* (1917), 33 T. L. R., 390, affirmed by C. A., 34 T. L. R., 70. The plaintiffs chartered the defendant's steamer for a voyage from Gibraltar to New York and back to a French port, at a monthly hire, payable each month in advance. The first month's hire was paid, and the vessel placed at the charterers' disposal. When she should have sailed from Gibraltar on 2 Dec., 1916, the British authorities refused to allow her to leave, and they did not release her until 10 Feb., 1917. On 12 Dec., 1916, the charterers claimed that the charter was dissolved and demanded repayment of the first month's hire. It was held (a) that the charter was dissolved on 2 Dec. or on 12 Dec., and

(b) that the charterers could not recover back the first month's hire.

8. In *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1917], 2 K. B., 1; affirmed by the House of Lords [1918] A. C., 119, the defendants in July, 1914, contracted with the plaintiffs to construct a reservoir, the work to be completed in six years, with a proviso that if the defendants were delayed in the work, the plaintiffs' engineer might extend the time. It was also provided that all plant, etc., brought by the defendants on the site should become the property of the plaintiffs. In February, 1916, the Minister of Munitions, being so empowered, ordered the defendants to cease all work on the reservoir, and also to remove certain of the plant and sell it to the owners of certain munition factories. The defendants thereupon claimed that the contract was dissolved; the plaintiffs contended that the position was merely one to be met by an extension of time granted by their engineer under the proviso above quoted. It was held by the Court of Appeals that the contract was determined, since an implied term must be read into the contract that it should cease if any action of the executive made performance impossible, and that the interruption by the Ministry's action was so serious as to create commercial impossibility of performance.

Concluding, and analyzing each one of the three exceptions heretofore set out, it will be seen that, (1), the death or physical inability, (2), the destruction of the subject-matter, and (3), the change of circumstances and law—the supervening events which rendered the performance of the contracts impossible, were incorporated into the contracts by an implied term. Neither party to the contract had contemplated them, and they dissolved the con-

tracts and released the parties thereto. Or, as Anson expresses it (14th Ed., p. 384):

> "Neither party can reasonably be supposed to have contemplated their occurrence, so that the promisor neither excepts them specifically nor promises unconditionally in respect of them."

And Mackinnon says, page 13 of his pamphlet:

> "The dissolution of a contract under this principle arises not by the operation of law as an external force, but by virtue of the contractual will of the parties themselves. In other words, if a court holds that the obligations of a contract have been discharged in this way, it certainly determines, as a matter of construction, all the express and implied terms (as it finds them to be) of the contract itself, that the parties have agreed that its obligation shall cease in the event which has happened. 'An examination of the cases confirms me in the view that when our courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. * * * It is, in my opinion, the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.' Lord Loreburn, *Tamplin* v. *Anglo-Mexican Co.* [1916], 2 A. C., at 403 and 404."

Therefore, the fourth rule, as classified by Anson, dissolution by impossibility of performance, becomes incorporated into and a part of the first rule and the contract then becomes dissolved by agreement. This is accomplished by implying a term in

the contract that it was not intended that either party should be bound to complete the contract under the supervening events which have made it impossible. The general rule then, as evolved out of the rigid common law after a long struggle, has been made to conform to the reason and common sense of the contract and the real intention of the parties.

The appellees will contend that the charter-party contained no exceptions, and the bill of lading contained the exception "perils of the sea only," and that, therefore, the doctrine above contended for does not apply to this case. None of the cases above set out rest the reason for their decision upon the ground that the contract contained exceptions, but on the contrary, reject that ground, and say that because the contract is an unconditional contract, the supervening event not having been in the contemplation of the parties, it dissolves the contract. The decisions in all these cases are based upon the general principles of dissolution of contract by impossibility of performance, although some of the contracts contained exceptions.

The appellees' contention that the doctrine only applies to executory contracts is wholly without foundation or authority, and is nowhere recognized in the cases as requisite to the application of the doctrine. In the majority of the cases above quoted, the doctrine was applied to partly executed contracts.

Having resolved the correct rules and principles applicable to contracts which have become impossible of performance without default on the part of either party, the question then to be decided is, do these principles apply to this case, and was the change of circumstances, consisting of the Govern-

ment's prohibition, such a one as goes to the very foundation of the contract? We think it was.

The schooner *Allanwilde* was refused a clearance by the customs authorities on instructions of the War Trade Board, and in accordance with the order of said board clearance was refused to all sailing vessels bound for the war zone.

We are not interested in the reasons which induced the Government to promulgate this order, except, perhaps, to ascertain the possible duration of it.

The reasons set forth in the official bulletin (p. 7 of Certificate) are "that steamers can navigate the war zone with less danger than slow-sailing craft, and sailing ships."

The question naturally arises, for how long was this order intended to be effective? The answer is, as long as the submarine menace continues.

There being no limitations or qualifications to the order designating its duration, it must be deemed to continue for an undefined period, and that period is, presumably, the duration of the war, and dissolves the contract.

The shippers dispute this, and say the order was only temporary in its nature, and, therefore, the carrier should have held the goods, and waited for the suspension of the order.

The question, therefore, is, was the carrier justified in presuming that the adventure was frustrated, the contract dissolved, in unloading the goods and returning them to the shippers?

The shippers say not, and refer to *Hadley* v. *Clark,* 8 Term. Reptr., 259; *Aldin* v. *The Insurance Co. of Pa.* (C. C. A., 3d Cir., 1808), 2 Wash., 312; *Lorent* v. *South Carolina Ins. Co.,* 1 Nott & McCord (S. C.), 305; *Kelley* v. *Johnson* (C. C. A., 3d Cir., 1811), 3 Wash., 45; *McBride* v. *The Marine Ins. Co.,*

5 Johns. (N. Y.), 299. All of these cases are based upon the decision of *Hadley* v. *Clark* (*supra*).

In the first case *Hadley* v. *Clark*, a ship was prevented from sailing by an order in council and the carrier held the goods on board for two years, and then attempted to say that the delay ended the venture. It was held that it did not. Lord Kenyon, *C. J.*, said of this delay, in arriving at a decision:

> "It would afford an argument against the defendants [ship owners] in this particular case, that they kept the goods on board during all this time *and thought they were bound by the contract.*" (Italics ours.)

Lord Wrenbury said, in *Horlock* v. *Beal* (House of Lords) [1916], 1 A. C., 486, 527, referring to *Hadley* v. *Clarke*:

> "For the purpose of the decision, I may take it that the plaintiff did not care when his goods reached Leghorn, so long as they got there.
>
> "It is, I think, no authority for the general proposition, that a contract of marine adventure remains binding when a supervening cause has rendered it impossible to perform it within such a time as that the adventure can be fulfilled as a commercial adventure."

The English Courts have relieved us of the necessity of further considering the law as laid down by this case, as they have ruled that it is no longer good law, and certainly not authority for the question under discussion.

See:

*Scottish Navigation Co.* v. *Souter* [1917], 1 K. B. 222; 114 L. T., 171.
*Horlock* v. *Beal* [1916], 1 App. Cas., 486.
*Metropolitan Water Board* v. *Dick Kerr & Co.* [1918], A. C., 119; (H. L.), 117 L. T. R., 767; per Lord Finley, affirming Court of Appeal [1917], 2 K. B., 1.
*Scrutton on Charterparties,* 8th Ed. (1917), p. 91.

The other four cases relied upon below by the shippers deal with the questions of total loss in marine insurance, and, as was well said by this Court in *The Kronprinzessen Cecilie,* 244 U. S., 12, in considering the question of the liability of performing a contract prevented by the war:

> "Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this."

And in *Russian Bank etc.* v. *Excess Insurance Co., Ltd.* (K. B. Div., 1918), 118 L. T., 645, the same distinction is made, and shows that the cases relied upon by the appellee are not authorities for the principle of law under consideration. The Court say:

> "There is no doubt that the action of the Turkish Government in closing the Dardanelles frustrated the adventure, and, if this were a charter-party case, the decision in *Geipel and others* v. *Smith and another* (26 L. T. Rep., 361; L. Rep., 7 Q. B., 404) would be in point, and decisive in the plaintiff's favor. This is not a charter-party, but a marine insurance case, and, although the words 'restraint of princes' means the same whether in charter-parties or in policies, it is clear

> from a comparison of *Hadkinson* v. *Robinson* (3 Bos. & P., 388) with *Geipel and others* v. *Smith and another* (*sup.*) that an adventure may be frustrated by restraints of princes, so as to excuse performance of a charter-party by a shipper or shipowner, and yet not give any right of return against underwriters for a constructive total loss."

Therefore the decisions relied upon by the shippers do not sustain their contention.

Although the law does not require such justification, subsequent events have vindicated the action of the carriers in assuming that the Government's order was to be permanent. More than a year has elapsed since it became effective, and it bids fair to continue in force during the continuance of the war.

In support of the carrier's position, Lush, *J.*, writing in *Geipel* v. *Smith*, L. R., 7 Q. B., 414, said:

> "If the impediment had been in its nature temporary, I should have thought the plea bad, but a state of war must be presumed to be likely to continue long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this."

This language is approved by the House of Lords, in *Horlock* v. *Beal*, 114 L. T., 193 [1916], 1 App. Cas., 486, and Lord Atkinson, quoting this language, continues, page 502:

> *"It is not necessary,* therefore, in such a case *to wait until the delay has occurred. It is legitimate to come to the conclusion* that the delay caused by war will be so long and so disturbing to commerce as to defeat the adventure, *and to act accordingly at once."* (Italics ours.)

And Bailhache, *J.*, writing in *Anglo-Northern Trading Co. Ltd.* v. *Emlyn, Jones & Williams* [1917], 2 K. B., 78, said, page 35:

> "The parties must have the right to claim that the charter-party is determined by frustration *as soon as the event upon which the claim is based happens.* The question will then be what estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service with such materials as are before him, including, of course, the cause of the withdrawal, and it will be immaterial whether his anticipation is justified or falsified by the event. This view is, I think, supported by such cases as *Geipel* v. *Smith* (1872), L. R., 7 Q. B., 404; *Notara* v. *Henderson* (1872), L. R., 7 Q. B., 225, 237; *The Savona* (1900), P. 252, 259, and *Embiricos* v. *Reid* [1914], 3 K. B., 45." (Italics ours.)

These decisions are sound law, and their authority is nowhere disputed. The propositions they lay down are consonant with common sense and good business judgment. In business it is essential that men give prompt and decisive judgment without trepidation or hesitancy. This facilitates business in that it insures clean cut issues on the positions taken by the parties.

The carriers in this case exercised a prompt and decisive judgment, putting the shippers in a position where they knew at once what they had to do in order to get the goods to destination. The carriers took a definite stand, said in substance to the shipper, "The adventure is frustrated," and returned the goods to the shippers. This prompt and unequivocal decision was advantageous to both parties. It enabled the shipper to forward its goods by a steamer and released the sailing ship for trade,

were it not that she was laboring under process of the Court. For, as was said by Rose, *D. J.*, in *Castle* v. *Swedish-American-Mexican Line*, 245 Fed. Rep., 911:

> "At this time, when ships are in so great demand, the shipowner is not only justified, but he is required, to use the utmost diligence to take on and discharge cargo with all possible speed."

It would afford an additional argument in this case that the urgent need of ships rendered it imperative upon the shipowners to make a prompt decision and release the vessel. To tie up a ship in these times, being such a valuable and useful vehicle for the maintenance of humanity, would be equal to a felony of the gravest sort. The ship has become literally indispensable to the existence of civilization. Its importance and the necessity of its continuous use could not be greater emphasized than by the fact that every first-class nation of the world has taken charge of its merchant ships so as to insure their continued usefulness.

The prohibition imposed by the Government is such a supervening event, as rendered the performance of the voyage indefinitely impossible, and dissolved the contract. As a commercial adventure it could no longer be performed. The charter-party, being for a definite voyage "out," the limits of which are completely defined by the mercantile language "for voyage from New York to Rochefort, France," that furnishes a definite standard for the computation of the time for which the charter is expected to continue. This voyage "out" was expected to take a certain definite time, and the parties had that time in view in entering into the contract, and the contract was expected to con-

tinue for that time, and no longer, and the voyage "out" having been indefinitely postponed, the contract is dissolved. (*Scottish Navigation Co.* v. *Souter* [C. A., 1916], 115 L. T., 812.)

The order of the Government and the refusal to grant the vessel clearance rendered the voyage *illegal*, prohibited the vessel from sailing and carrying out the contract during presumably the period of the war, and, therefore, it was one of a permanent nature.

If this prohibition is presumed to continue during the continuance of the war, does that not cause such an enforced delay of indefinite duration as to completely frustrate the adventure in a mercantile sense? We think it does.

In addition to this, it was the intention of the parties to this agreement, or at least their implied intention, that the contract was to be frustrated and dissolved by any event, beyond their power, which prevented its performance. This must be implied from the nature of the language used, to wit: "Freight earned and irrevocable, vessel lost or not lost." For, if a construction equivalent to complete frustration is not given to the clause, the latter part of it is meaningless. If the rule of *ejusdem generis* is applied, "not lost" refers to something equivalent to "vessel lost," and what is nearer to the vessel being lost, so far as the shipper is concerned, than a complete frustration of the entire adventure? As was said by Ward, *C. J.*, writing the prevailing opinion of the Circuit Court of Appeals, Second Circuit (1918), in the case of *International Paper Co.* v. *The Schooner Gracie D. Chambers,* not reported, opinion attached hereto as Appendix II:

> "The clause (vessel lost or not lost) variously phrased, is intended to cover all con-

> tingencies. If only the loss of the ship was contemplated, the additional words 'or not lost' would be meaningless."

Learned Hand, *D. J.*, writing a dissenting opinion in the same case, and referring to the same phrase, said:

> "They can, I think, hardly have been intended merely as an intensive, and if they have any qualifying value at all, I see no other so natural as to include contingencies which should frustrate the venture after its inception."

That case included the exception of restraint of princes, etc., and, of course, the mention of specific exceptions excludes others, but to say that the mention of none totally defeats the intention of the parties, makes meaningless the clause above quoted and overthrows the principles herein contended for and which have been centuries in formulating. This Court, however, has settled this point in *The Kronprinzessen Cecilie* (*supra*). Paraphrasing its language and applying it to this case, this Court would have said it would be extravagant to say the implied exceptions were excluded because they were not written in; neither party to the contract thought it would not be performed. If it had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed.

It was an implied term of this charter-party that it should be practicable for this ship to sail on this voyage, as neither party ever thought that the United States Government would ever render it *illegal* by prohibiting the voyage, and neither party excepted it specifically nor promised unconditionally in respect of it.

Applying these principles to the present case, they are conclusive of the appellant's contention that the adventure became *illegal,* was frustrated and the contract dissolved. The governmental order prohibiting the completion of the contract was such a supervening event, going to the very foundation of the contract, as neither party thought of *nor* promised unconditionally in regard thereto. Both parties looked to performance; neither anticipated prevention. Both parties looked to the continued legality of the venture; neither anticipated subsequent illegality.

Therefore, the law implies a term in the contract that such a supervening event dissolves the contract, relieves the carrier from any further duty of carrying the goods to destination, justifies the carrier in immediately ordering them unloaded, and claiming the adventure was frustrated and the contract thenceforth dissolved.

Question 1 of the Circuit Court of Appeals should therefore be answered in the affirmative.

The bill of lading in *The Pidwell* contains clauses which cover this situation *in toto* and give the carrier the right to discharge the cargo and discontinue the voyage without any liability to the shipper. As all that has been said applies equally to this case, question No. 3 should be answered in the affirmative.

## POINT II.

### Was the carrier justified in refusing to refund prepaid freight?

As the principle of law involved in this question applies to questions No. 2 and 4 propounded by the Circuit Court of Appeals, we will consider them together.

If the correct doctrine is, as we have contended, that the supervening Government order rendered the contract illegal, and impossible of performance and dissolved it, and thenceforth the parties were relieved from the obligation to go on with the contract, then it follows that upon the dissolution of the contract the parties are left in the same status in which the impossibility of performance finds them. As has been well stated in a recent case, the contract remains perfectly valid down to the time when the unforseen event occurs. Any payments made under it, for instance, or any rights which may have become vested, are left untouched, and it is only from the time in question that the parties are excused from further responsibility. See *Chandler* v. *Webster*, C. A. [1904], 1 K. B., 493. Or, as Mr. Justice Storey said, in *The Saratoga*, 2 Gallison, 164, 178:

> "The legal effect, therefore, of such an interdiction of commerce (war between Great Britain and the United States) was to absolve both parties from any further performance of the contract."

See *Scott* v. *Libby*, 2 Johns (N. Y.), 336; *The Tutela*, 6 Rob., 177.

And MacKinnon, in his pamphlet, "Effect of War on Contracts," Oxford, 1917, page 18, says:

> "If the contract be dissolved under this principle (impossibility of performance), it ceases to bind either party from the date of such dissolution, but that is all that happens. The contract has been binding on both parties until this, nothing that has been done by either party while so bound will be undone, and no right that has accrued to either party before the dissolution will be abrogated. Consequently 'any payment previously made, and any legal right previously accrued, according to the terms of the agreement, will not be disturbed.' (Romer, *L. J., Chandler* v. *Webster* [1904], 1 K. B., at p. 493),"

and cites the following cases in support:

*Civil Service Society* v. *General Steam Co.* [1903], 2 K. B., 756.

*Lloyd Royal Belg* v. *Stathatos* (1917), 33 L. T. R., 390.

*Metropolitan Water Board* v. *Dick Kerr & Co.* [1917], 2 K. B., 1.

*Appleby* v. *Myers* (1867), L. R., 2 C. P., 651,

~~illustrates this principle.~~

Therefore, if the carrier was justified in considering the contract dissolved, then the dissolution of the contract left the parties exactly as it found them upon the taking effect of the Government's order, and the carrier was justified in ordering the cargo unloaded and is released from any further responsibility under the contract.

This being so, the question then arises as to what are the rights of the appellant in regard to advance freight.

The charter-party reads:

> "Freight to be prepaid net on signing Bills of Lading, in United States Gold, or equivalent, free of discount, commission or insurance. Freight earned, retained and irrevocable. Vessel lost or not lost."

What it is important to bear in mind on this subject is what was said by Lord Esher, *M. R.*, in *Oriental Steamship Co.* v. *Taylor* (C. A.) [1893], 2 Q. B., 518, 524:

> "From the moment when it becomes payable, advance freight cannot be insured by the shipowner. *The freight, according to the contract, is then due to him by virtue of contract at that time and at that moment. That does not depend upon whether the ship arrived or not; it is payable at that moment. It is money payable on contract, not depending upon any vicissitude of the voyage at all.*" (Italics ours.)

In the recent case of *International Paper Co.* v. *Schooner Gracie D. Chambers* (C. C. A., 2nd Circuit), decided in May, 1918, not yet reported (see Appendix II of this brief), where, under a similar provision as in this case, freight was paid in advance, and the vessel was prohibited from sailing by the same order which prohibited the *Allanwilde* from sailing, it was held that the money paid as freight was earned on the delivery of the bill of lading, and that the right to it and its retention did not depend upon delivery of the cargo.

The Court, in that case, points out that the advance freight, when payable under the terms of

such a contract as we have here, is payable by virtue of the contract against the delivery of the bill of lading, and it cannot be recovered by the shipper should the contract become frustrated. The Court also says:

> "The English law on the subject of prepaid freight [is] the same without any specific contract as our law is, when the contract provides that it shall be retained."

Therefore, the English adjudications on the question of prepaid freight are authority for the point under consideration.

That advance freight cannot be recovered when once paid, and may be retained by the carrier upon the frustration of the voyage, is the settled law both in this country and England, as is shown by the following citations:

7 *Amer. & Eng. Enc. of Law,* 246.

*Carver on "Carriage of Goods by Sea,"* 5th Edition, 1909, p. 726.

*Greeves* v. *West India Company* (1870), 22 L. T. R. 615.

*Oriental Steamship Company* v. *Taylor,* C. A. [1893], 2 Q. B., 518.

*The Queensmore,* 51 Fed. Rep., 250.

*Portland Flouring Mills Co.* v. *British & Foreign Marine Insurance Co.,* 130 Fed. Rep., 860 (C. C. A., 9th C., 1904); (Petition for Writ of Certiorari denied, 195 U. S., 629).

*Burn Line Ltd.* v. *United States & A. Steamship Co.* (C. C. A., 2nd C., 1908), 162 Fed., 298.

*National Steam Navigation Co.* v. *International Paper Co.* (C. C. A., 2d C., 1917), 241 Fed., 861.

*International Paper Co.* v. *Schooner Gracie Chambers* (C. C. A., 2d C., 1918), not yet reported, Appendix II of this brief.

*A. Coker & Co* v. *Limerick S. S. Co., Ltd.* (House of Lords), 118 L. T., 726.

The last case (*Coker & Co.* v. *Limerick*) is an exceptionally strong case in favor of the appellant. The clause there was, "The freight to be payable on signing bills of lading less 3 per cent in Liverpool in cash before sailing," and although only a part of the goods were loaded on board and bills of lading signed for only part of that loaded when the vessel caught fire and sunk at the pier, it was held that the carrier was entitled to retain and recover advance freight for all goods which had been loaded on board whether bills of lading were signed or not.

The same argument was made in this case as in the Circuit Court of Appeals, Second Circuit, March 13, 1917, in *National Steam Navigation Co.* v. *International Paper Co.* (*supra*), to wit, that all the bills of lading should be signed before advance freight became payable, and the same answer was given, that the whole risk was on the shipper upon the receipt of the goods aboard the ship, and he was liable for the advance freight at that time whether bills of lading were signed or not. The reason seems to be that upon loading the goods a receipt is given, on the presentation of which a bill of lading could be demanded, and it would be idle to make the payment rest upon the mere act of signing the bill.

Lord Atkinson said in the *Coker* case:

> "It was admitted it could not, upon the authorities, be successfully disputed that, if

> the advanced freight became payable under the charterparty, the subsequent loss of the cargo could not affect the owners' right to that freight."

Indeed, the law is so well settled on this point that the appellee can find and cite no authorities against this contention, but only those which deal with the payment of freight in advance without any agreement for its retention. Concededly, those cases are good law in this country, but once an agreement is made for its return, then the law is identical with the English, and the freight cannot be recovered back on the frustration of the adventure.

As was said by Hawley, *D. J.*, in *Portland Flouring Mills* v. *British & Foreign Marine Ins. Co.*, 130 Fed., 860, 863 (C. C. A., 9th C., 1904), quoting language of Lord Ellenborough, *C. J.*, in *De Silvale* v. *Kendall*, 4 M. & S., 37, 42:

> "'But it is competent to the parties to a charter-party to covenant by express stipulations in such manner as to control the general operation of law.' * * * 'if the parties have chosen to stipulate by express words * * * that part of the freight * * * should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate?' * * *
>
> "It is enough to say that the contract as made is valid and of binding force."

Appellees further contend that the clause only protects the shipowner if the vessel and cargo be lost through the excepted perils.

Suppose, however, as in this case, there are no excepted perils in the charter-party. Would it be contended that the contract is meaningless? That

the parties had no reason for saying, "Freight earned, retained, and irrevocable, vessel lost or not lost"? We do not think so. Those words mean that should the vessel be lost the freight may be retained. Applying the doctrine of *ejusdem generis* to the words "or not lost" and construing them in the light of the words going before, it is clear that their meaning is that if the voyage is terminated in any way as effectually as if the vessel was lost, *e. g.*, by frustration of the adventure, voyage broken up, or made impossible, then the freight paid may be irrevocably retained by the carriers. *International Paper Co.* v. *Schr. Gracie D. Chambers* (*supra*). The adventure having been frustrated and made impossible, what has been heretofore said under Point I justifies the carrier in retaining the advanced freight.

In the *Pidwell* case the bill of lading itself justifies the retention of the freight by the carrier.

Therefore, the law being conclusively settled in favor of the retention of advance freight by the carrier, where the same is paid under contract, to be earned and retained irrevocably, vessel lost or not lost, questions Nos. 2 and 4 of the Circuit Court of Appeals should be answered in the affirmative.

New York, October 7th, 1918.

Respectfully submitted,

OSCAR D. DUNCAN,
RUSSELL T. MOUNT,
COURTLAND PALMER,
Counsel for Allanwilde Transport Corporation,
Claimant-Appellant.

## Appendix I.

WAR TRADE BOARD
BUREAU OF TRANSPORTATION
Washington, D. C.

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GENERAL RULES NO. 1.

Governing Granting Licenses for Bunker Fuel, Port, Sea, and Ship's Stores and Supplies

No vessel shall be allowed to clear from any port of the United States, or any United States possession, without having secured a license or licenses from the War Trade Board, through its Bureau of Transportation, covering all the bunker fuel aboard the vessel at the time of sailing (including coal, coke, oil, kerosene, and gasoline) and port, sea, and ship's stores and supplies. Stores and supplies are for convenience hereafter included with bunker fuel under the general designation of "bunkers." Before the loading of any "bunkers" on any vessel at any port of the United States or its possessions shall be permitted, the license for "bunkers" must be obtained. All applications for licenses for "bunkers" must be made upon Application Form B-1, or such other form as may hereafter be adopted by this Board. Applications for such licenses shall be approved only in accordance with the following and such other rules as may from time to time be adopted:

I. No application for "bunkers" by a sailing vessel for a voyage into the submarine war zone shall be approved. Sailing vessels equipped with auxiliary motive power shall, in the application of these rules, be classified as sailing vessels. A motor ship

having no sailing power whatsoever shall be deemed to be in the same class as a steamship.

II. No application for "bunkers" by any vessel which has disobeyed any order of the United States Navy or of the United States Shipping Board, hereinafter called "Shipping Board," shall be approved.

III. No application for "bunkers" by any vessel of American registry not requisitioned by the "Shipping Board" shall be approved, except for a voyage and in a trade approved by the War Trade Board, and, if under charter, unless the charterer and the terms and conditions of the charter are approved by the War Trade Board.

IV. No application for "bunkers" by any neutral vessel shall be approved unless the person or persons managing, owning, chartering, or controlling such vessels shall have reported to and filed, in duplicate, with the War Trade Board, the name of all the vessels and the masters, and any changes that may from time to time have occurred respecting said vessels and masters, managed, owned, chartered, or controlled by him or them.

V. No application for "bunkers" by any neutral ship shall be approved unless the person or persons owning, managing, chartering, or controlling such vessel shall enter into an agreement in a form to be approved by the War Trade Board, agreeing to comply with and be bound by each and all of the following regulations. Failure to comply with any of these regulations in the case of any one vessel may involve the refusal of "bunkers" to all of the vessels of the particular person, firm, or corporation managing, owning, chartering, or controlling the vessel in question.

(*a*) No vessel shall be chartered to a subject (including a person, firm, or corporation) of Germany or its possessions, or of any power allied with Germany, or to any person, firm, or corporation who or which shall not be acceptable to the War Trade Board.

(*b*) No vessel shall trade with, or be bound to, any port in Germany or its possessions, or to any country allied with Germany, nor shall a vessel aid any vessel employed by or for Germany or any country allied with Germany.

(*c*) No vessel shall, without the consent of the State Department, carry any subject of Germany or its possessions, or of any country allied with Germany.

(*d*) No vessel shall carry any cargo which comes from or through or is destined to Germany or its possessions, or to any country allied with Germany.

(*e*) Every vessel which proceeds from or to the United States, to or from Norway, Sweden, Denmark (including Iceland and the Faroe Islands), Holland, Spain, or to or from any neutral port in the Mediterranean Sea, shall call for examination as may be directed by the War Trade Board.

(*f*) No vessel shall carry from a port outside the United States to any European port cargo which has not been previously approved by the War Trade Board or the Inter-allied Chartering Executive.

(*g*) No vessel shall carry any cargo from Norway, Sweden, Denmark (including Iceland and the Faroe Islands), Holland, Spain, or Switzerland to any ports unless such cargo is accompanied by a certificate of nonenemy origin.

(*h*) No vessel shall carry any goods which are consigned to "order" (goods may, however, be consigned to the order of a named person, firm, or corporation when such person, firm, or corporation is the actual consignee). This provision shall not apply to goods shipped from a port of the United States or its possessions to countries other than Norway, Sweden, Denmark (including Iceland and the Faroe Islands), Holland, Spain, and Switzerland.

(*i*) No vessel shall carry any coal or mineral oil (including naphtha and gasoline) unless the consignee is approved by the War Trade Board.

(*j*) If a vessel is fitted with wireless telegraphy, the sending apparatus shall be sealed in such manner that no message can be sent without the knowledge of the master. The master shall be responsible for seeing, first, that no message to the enemy is sent by wireless telegraphy; second, that no reports are made of vessels sighted or of any weather conditions experienced; third, that no wireless messages of any kind are sent within 200 miles of England, France, Portugal, or Italy, except emergency messages relating to vessels or persons in distress.

(*k*) The owner or charterer shall, upon request to do so by the War Trade Board, dispense with the services of the master, officers, or any members of the crew.

(*l*) No vessel shall proceed on any voyage or be chartered on trip or time charter without the previous consent of the War Trade Board or the Interallied Chartering Executive.

(*m*) No vessel shall carry any cargo which is consigned to or shipped by any person, firm, or cor-

poration with whom citizens of the United States are prohibited by law from trading.

(*n*) No vessel shall carry to or from any European port any cargo which is consigned to or shipped by any person, firm, or corporation with whom citizens of any of the allied countries are prohibited by law from trading.

(*o*) No vessel shall be bought or sold without the previous approval of the United States Shipping Board, War Trade Board, or of the Interallied Chartering Executive.

(*p*) No vessel shall be laid up in port without the approval of the War Trade Board or the Interallied Chartering Executive.

(*q*) Every vessel clearing from a port of the United States shall observe all orders and requirements of the Committee on Ship Protection of the Emergency Fleet Corporation, of the Navy Department, of the Department of Commerce, and of the Bureau of War Risk Insurance of the Treasury Department.

(*r*) All "bunkers" received by any vessel shall be used solely for the purposes of the vessel, and no portion of the bunkers shall be landed in any port or transferred to any other vessel.

(*s*) A report in duplicate shall be furnished to the War Trade Board each month, showing in detail the movement of all vessels subject to these regulations.

## Appendix II.

### UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

May, 1918.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

INTERNATIONAL PAPER COMPANY, libelant-appellee, v. Schooner GRACIE D. CHAMBERS, her tackles, &c., FLORENCE G. PAYNE, claimant-appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Stetson, Jennings & Russell for libelant-appellee (R. L. von Bernuth and Frederic Cunningham, Jr., of counsel); Robinson Leech for claimant-appellant.

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WARD, Circuit Judge.—September 14, 1917, the schooner Gracie D. Chambers began to load a general cargo in the Port of New York to be delivered at Bordeaux. Between September 27 and 29 the libelant Paper Company shipped 120 tons of print paper.

September 28, at 4:25 P. M., the Treasury Department at Washington telegraphed the Collector at the Port of New York to withhold clearance of all sailing vessels any part of whose voyages would bring them within the danger zone. There was no official publication of this embargo, but it was put into effect beginning September 29 by the refusal

of clearances to such vessels as applied for them. Both the shippers and the shipowners had heard rumors of the embargo as early as October 1.

October 3 the schooner moved out to an anchorage at the Red Hook Flats to save wharfage charges and to await clearance.

October 4 the freight was paid against delivery of the bill of lading.

October 5 the master applied to the collector for clearance, which was refused. He then applied to the authorities at Washington to except this schooner from the embargo on the ground that she had begun to load before the order was made. Refusal to allow an exception in her favor was not definitely and finally made until October 10. Subsequently the cargo was discharged and the owners refused to return the prepaid freight.

The bill of lading contained the following provisions:

"Restraints of Princes and Rulers excepted."

"Freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost."

Claimant relies on these clauses for a defense to the libel.

By our law freight is earned only upon delivery of cargo. The ship may have carried the cargo on a voyage of 3,000 miles and to within one mile of destination, but the carrier has earned no freight and must return any freight prepaid if he has not delivered. The parties, of course, may agree upon a different rule, and for that purpose a clause has been introduced into bills of lading and charter-parties from time out of mind that prepaid freight shall not be returned "ship lost or not lost." The clause variously phrased is intended to cover all

contingencies. If only the loss of the ship were contemplated the additional words "or not lost" would be meaningless. What the parties intend is that the carrier shall keep the freight even if he does not deliver the cargo, unless the failure to deliver be due to the carrier's fault or to a peril not excepted in the bill of lading or charter-party.

The clause in this bill of lading is not very artistically drawn because of the insertion of the conjunction "and" between the words "retained" and "irrevocably." Yet the meaning is perfectly clear; "retained and irrevocably, ship and/or cargo lost or not lost," means retained and irrevocably retained. In the case of The Allanwilde (247 Fed. Rep., 236) the words were "retained and irrevocable," but the meaning is exactly the same, to wit, that the prepayment of freight was irrevocable and was to be irrevocably retained. The marine document in each case contained an exception of the restraint of princes. The government's embargo was such a restraint and the exception covered it exactly as it would cover perils of the sea.

It is to be remembered that goods delivered to the carrier even before actual loading aboard are in his custody, and that the maritime engagement is begun, the goods being bound to the ship for the freight and the ship bound to the goods for transportation in accordance with the contract (Bulkley v. Naumkeag Co., 24 How., 386; Scott v. The Ira Chaffee, 2 Fed. Rep., 401). The money sought to be recovered in this case was paid as freight against delivery of the bill of lading, whether earned or not.

The apparently inequitable result in this case is a temptation to interfere in a contract made by parties perfectly competent to contract and contracting in the face of the very emergency which subse-

quently arose. This is to be especially avoided in construing familiar and long established provisions in commercial documents. The district judge in the case of The Allanwilde (supra) made an additional suggestion to the effect that the carrier was bound to transship the cargo. That, however, is a discretion which is to be properly exercised on behalf of the shipper when he is not present or cannot be communicated with, which is not this case. It is also a privilege which the law gives the master as representing the owner to earn his freight if he will lose it by abandoning the voyage.

The district judge thought that if the ship had broken ground, e. g., if she had sailed a mile, the prepaid freight might be retained. Clearly it could not be retained for that reason, because under our law it is not earned until delivery of the cargo. Only the clause in the bill of lading could authorize the retention.

The case of The Tornado (108 U. S., 342) is not applicable. The voyage in that case was completely frustrated by a fire which rendered the ship unseaworthy and unable to proceed within a reasonable time. The question involved was the right to transship the cargo. The carrier claimed a lien upon the cargo for his freight on the ground that he had been deprived of his right to transship it and so earn his freight. No freight was prepaid or payable and none had been earned. The court held that the parties had contracted with reference to a particular vessel which no longer existed, and likened the case to that of Taylor v. Caldwell (3 Best & Smith, 826), in which the owner of a music hall was excused from his contract to let it for a performance because it had been burned down. If the contract in the case of the music hall had contained a provi-

sion that the owner was to be liable even if it burned down, the conclusion would obviously have been different. The House of Lords in the case of Coker v. Limerick SS. Co. (34 Law Times Rep., 18) lately decided that the shipowner was entitled to recover freight payable on signing bills of lading, although the vessel and cargo were burned during the loading and before the voyage began but after bills of lading were signed, the English law on the subject of prepaid freight being the same without any specific contract as our law is when the contract provides that it shall be retained.

Our decision in National Steam Navigation Co. v. International Paper Co. (241 Fed. Rep., 86) requires the decree to be reversed, and what was said in Ocean SS. Co. v. U. S. Steel Products Co. (239 Fed. Rep., 823) as to the retaining of prepaid freight, being concededly obiter, is not controlling.

Decree reversed.

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LEARNED HAND, District Judge (dissenting)—Under the American rule, prepaid freight, which is not earned till the voyage is completed, may be recovered back (Griggs v. Austin, 3 Pick., 20). Hence under our law the claimants must rely wholly upon the clause in the bill of lading. It must be conceded that in England prepaid freight is now recoverable even though the ship has never broken ground, but is burned at her pier (Coker v. Limerick SS. Co., 34 Times Law Reports, 18). We have therefore to determine what meaning to ascribe to language which like all that used in such documents is scarcely more than a skeleton of the thought's body. Much could be said for the libelant's posi-

tion had the clause merely read "retained irrevocably," but it did not. We must take the addition as qualifying the meaning by the conditions which it introduces. The loss of the ship is one condition, and it is urged that the other includes every possible contingency in which the ship is not lost. Read verbally this may be so; certainly I do not doubt that it covers cases in which the ship is not lost. Yet if one in this way makes the two alternatives logically exhaustive, the result is to give no meaning whatever to the added conditions. They can, I think, hardly have been intended merely as an intensive, and if they have any qualifying value at all, I see no other so natural as to include contingencies which should frustrate the venture after its inception. At least, this, it seems to me, is the most extended meaning which it can have.

So much for mere textual consideration of the language. However, as in all such cases, the meaning of words is best gathered from the purpose that informed them, and that purpose, taken from the standpoint of a fair observer, was to meet the possible difficulties which might arise in the performance of the contract. If a ship breaks ground and is lost or returns to her port of departure, the shipper has got nothing for his freight. From his view it is an injustice that the ship should hold prepaid freight. Yet the ship has performed part of the service and from its view the prepayment may be taken at least in part as compensation for the service so far performed. The ship has given a part of her time; her loss is actual. There is, therefore, an entirely understandable reason why the shipper should accept the hazard of the voyage, once begun. A nicer justice might, it is true, apportion the prepayment to such time as the ship had in fact lost, if the frustration was partial, but

there are obvious practical difficulties in such a course.

This, however, is not the case of frustrating a voyage, but a contract, and, looked at from the time when the contract was made, it can hardly be thought that the shipper was to bear not only the chance of the voyage, but of the contract. Because, if the contract be frustrated before loading, the ship has lost nothing, and if the frustration occurred before breaking ground, at most nothing beyond detention while loading and discharging. She remains available for carriage during the same period as before. If one construes the clause as justifying her retention of the prepaid freight, she is in effect given two freights for the same period. Such a conclusion can hardly be within the compass of what the shipper would have conceded or the owner demanded had they been faced with the possibility at the outset. Therefore I think the result was not within the intention of the parties, when in one way or another some construction must be imposed upon a mere outline of intent like this. I conclude, therefore, that the clause applies to the voyage only, and that if the voyage be frustrated *in limine*, that is, before ground broken, it does not entitle the owner to retain the freight.

The authorities, so far as they go, are at least not to the contrary. In The Tornado (108 U. S., 348) the ship was destroyed at her pier and the owner sued the cargo, demanding freight because he had not been allowed to complete the voyage in another bottom. The headnote says that the freight was to be paid upon delivery, but an examination of the record does not bear out the statement. In any event the court decided that the shipper was

absolved from further performance on account of the frustration of the voyage *in limine*. The implication at least was that had the vessel broken ground the result might have been different. While it is hard to see how the owner could in any case have recovered more than damages, that point was not raised, and the case seems to me an authority for the proposition that a frustration *in limine* puts an end altogether to the contract of affreightment. Now I suppose no one would contend that the result would be different under the clause at bar if the ship had been burnt. If so, I cannot quite see why the owner should be allowed to keep his unearned freight and yet, under The Torando (supra) not be allowed to sue because he was prevented from earning the freight. The Allanwilde (247 Fed. Rep., 236) went further than need be here, further perhaps than I should care to go. I have found no other case in point. Prepayment clauses under our law must be construed as intended for security rather than insurance to the owner. I am disposed therefore to look narrowly upon a clause like this which seeks to impose upon a shipper not only the risks of a voyage, but a gratuity for a voyage never undertaken.

I dissent.

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-[illegible]

ALLEGHENY TRANSPORT CORPORATION,

*Petitioner*,

v.

FAILURE OF COMPANY,

*Respondent*.

No. 74-[illegible]

ALLEGHENY INVESTMENT CORPORATION,

*Petitioner*,

v.

[illegible],

*Respondent*.

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# Supreme Court of the United States,

OCTOBER TERM 1918.

Nos. 449 and 450.

ALLANWILDE TRANSPORT CORPORATION,
Claimant-Appellant,

AGAINST

VACUUM OIL COMPANY,
Libelant-Appellee.

ALLANWILDE TRANSPORT CORPORATION,
Claimant-Appellant,

AGAINST

A. W. PIDWELL,
Libelant-Appellee.

## BRIEF ON BEHALF OF LIBELANTS-APPELLEES.

### Statement.

On May 26, 1917, the libelant Vacuum Oil Company and the Allanwilde Transport Corporation, the claimant, owner of the "Allanwilde", entered

into a charter party (a copy of which is attached to the Certificate of the Circuit Court of Appeals herein) for the carriage of a cargo of lubricating oil in barrels, to be furnished by libelant, from New York to Genoa, Italy (afterward changed to Rochefort, France), at the rate of $16.50 per barrel (afterward changed by agreement to $15.25). The charter party contained the following provision as to freight:

> "Freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission or insurance. Freight earned retained and irrevocable, vessel lost or not lost."

*The charter party did not contain an exception of "restraints of princes, rulers and peoples".* In fact, it contained no exceptions whatever, but was in the form of an unqualified undertaking on the part of the vessel to deliver the cargo at Rochefort, France.

On August 25th, after the oil had been loaded, the vessel issued a bill of lading (a copy of which is attached to the Certificate of the Circuit Court of Appeals herein). The bill of lading contained a clause: "All conditions and exceptions of charter party are to be considered as embodied in this bill of lading". With one exception, the bill of lading, like the charter party, was devoid of exceptions. It provided that the cargo was "to be delivered in like order and condition at the port of Rochefort (*the dangers of the seas only excepted*)."*

The other libelant, A. W. Pidwell, was permitted to ship certain kegs of wire nails on the vessel, and on August 15th the vessel issued a bill of lading

---

*The italics throughout this brief are ours.

to him (a copy of which is attached to the certificate). The Pidwell bill of lading contained an exception of "restraint of governments, princes, rulers or peoples" and other exceptions as stated in the certificate of the Circuit Court of Appeals. It provided that full freight to destination was due and payable upon receipt of the goods and that the same should be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service thereunder without refund in whole or in part, goods or vessel lost or not lost, or if the voyage be broken up.

The full amount of the freight was prepaid by both shippers, the libelant Vacuum Oil Company paying $49,745.50 and the libelant Pidwell paying $3,128.

On September 11th the vessel cleared from New York and set sail for Rochefort. After she had been out about fourteen days and had met with heavy weather her master determined to put back to New York to make temporary repairs. The vessel arrived at New York on October 5th.

On September 28th, while the vessel was at sea, the United States Government decided thereafter to withhold clearance to any sailing vessel bound for the war zone (see instructions and official bulletin, copies of which are attached to the Certificate herein). Consequently when the repairs to the vessel were effected and the master again sought to clear, clearance was refused and could not be obtained in spite of the efforts of both parties to induce the Government to modify its stand. Toward the end of October the shippers were required by the master to unload their cargoes, which they did, but under protest and reserving their rights. The vessel refused to refund the freight to either shipper. Thereafter the Vacuum Oil Company was

obliged to forward its cargo by steamship at a very much higher rate of freight and subject to other charges; it was not shown what disposition of the nails was made by the libelant Pidwell.

Libels *in rem* against the vessel were filed by both shippers in the United States District Court for the District of New Jersey, claiming damages for the breach of the obligation of the vessel to carry the cargoes to Rochefort, France. The District Court on the 4th day of December, 1917, granted decrees in favor of both libelants, not, however, for the full amount of their damages, but only for the amount of the prepaid freight, less the special charges incurred by the vessel in caring for the cargo after the return to the port of departure. A copy of the opinion of Judge Rellstab in the District Court, reported in 247 Fed. at page 236, is hereto annexed marked "Appendix 1".

On December 14th, the "Allanwilde" was sold and the proceeds were placed and now remain in the registry of the Court. Appeals were promptly taken by the claimant to the Circuit Court of Appeals for the Third Circuit, before which they were duly argued on the 15th day of March, 1918. Subsequently the Court of Appeals, before deciding the appeals, determined to ask the instructions of this Court upon the following questions:

> "1. Was the adventure frustrated, and was the contract evidenced by the charter-party and by the bill of lading issued to the Oil Co. dissolved, so as to relieve the carrier from further obligation to carry the oil?
>
> 2. Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

3. Was the adventure frustrated, and was the contract evidenced by the bill of lading issued to Pidwell dissolved, so as to relieve the carrier from further obligation to carry the nails?

4. Whatever answer may be given to the third question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?"

The answers to the questions certified will, it is submitted, be determined by the general principles of maritime law applicable to contracts of affreightment. In exemplification of these principles, the following points are offered:

## POINT I.

### The earning of freight.

The libelants in the present cases paid in advance for a service which was never in fact rendered.

"Freight" is the compensation payable by the shipper for the carriage *and proper delivery at destination* of the cargo.

*Scrutton on Charter Parties*, Art. 136.
*Parsons, Law of Contracts* (9th Ed.) Vol. 2, p. 422.
*Kirchner* v. *Venus*, 12 Moo. P. C. 361.
*Tirrell* v. *Gage*, 4 Allen 245.

If, for any reason whatsoever, other than the fault of the shipper, the cargo fails to arrive at destination in merchantable condition, no freight is earned.

*Asfar & Co.* v. *Blundell* [1896] 1 Q. B. 123.
*The Harriman*, 9 Wall. 161.

*The Kimball,* 3 Wall. 37, at pp. 44-45.
*Willett* v. *Phillips,* 8 Ben. 459; Fed. Cas. 17683.
*Burn Line* v. *United States & A. S. S. Co.,* 162 Fed. 298.

Where the voyage is interrupted by any cause, even by a peril excepted in the contract, the vessel has the privilege of forwarding the cargo by another vessel in order to earn its freight, but unless it does so forward the cargo to destination no freight is payable.

*Hunter* v. *Prinsep,* 10 East. 378.
*The Tornado,* 108 U. S. 342, at p. 347.
*Parsons on Admiralty and Shipping,* Vol. 1, p. 231.

**Prepaid freight.**

A contract of affreightment may and frequently does provide that freight shall be prepaid upon shipment. In such a case, if the arrival of the cargo at destination is thereafter prevented by some cause excepted in the charter party (as by a peril of the sea) the American and English law differ upon the right of the vessel to retain the freight. The American and Continental law require the freight to be returned to the shipper, since it has not in fact been earned.

> "Freight being the compensation for the carriage of goods, if paid in advance, is in all cases, unless there be a special agreement to the contrary, to be refunded, if from any cause not attributable to the shipper the goods be not carried." (Mr. J. Field in *The Kimball,* 3 Wall. 37, at pages 44-45.)

The English law in such a case is to the contrary. The distinction is well expressed by the opinion of the Circuit Court of Appeals for the Second Circuit in the recent case of *National Steam Navigation Co.* v. *International Paper Co.*, 241 Fed. 861, at page 862:

> "The English cases on the subject of prepaid freight do not express the law of this country. Here prepaid freight, in the absence of an agreement to the contrary, must be returned to the shipper, if the goods do not arrive, and in such case the shipowner cannot recover it of the shipper, if not actually prepaid. For this we have the high authority of Chancellor Kent in Watson *v.* Duykinck, 3 Johns. (N. Y.) 335 (1808); Griggs *v.* Austin, 3 Pick. (Mass.) 20, 15 Am. Dec. 175 (1825); 11, 185 (1837); Phelps *v.* Williamson, 5 Sandf. (N. Y.) 578 (1852); Benner *v.* Insurance Co., 6 Allen (Mass.) 222 (1863); of the Supreme Court in The Kimball, 3 Wall. 37, 18 L. Ed. 50 (1865); and finally of our own decision in Burn Line, Ltd. *v.* Steamship Co., 162 Fed. 298, 89 C. C. A. 278. To the same effect is the law of the Continent."

**Stipulation that prepaid freight shall be irrevocable.**

It is doubtless due to the divergence between the American and English rule upon prepaid freight that vessel owners have sometimes insisted upon inserting in contracts of affreightment a provision that prepaid freight shall be "irrevocable, ship lost or not lost". During the present war when the demand for vessels has been so great that the shipowners have been able to exact their own terms, it has become a very general practice to insert such a provision.

Obviously the insertion of such a clause cannot

lessen the obligation of the vessel to perform the voyage nor enlarge the exceptions by which it has stipulated to excuse non-performance. It would seem that a contrary rule of construction should be applied and that the vessel should be held even more strictly to the performance of the obligation for which the compensation has been irrevocably prepaid. Even under the English rule, the amount of the prepaid freight can be recovered as an item of damage if the vessel has failed to perform the voyage in consequence of a cause against which it has not provided in its contract.

> *The Great Indian Peninsula Ry. Co.* v. *Turnbull,* 53 L. T. 325.
>
> *Dufourcet & Co.* v. *Bishop,* 18 Q. B. D. 373. [1887]
>
> See also *Weir & Co.* v. *Garvin & Co.,* 1 Q. B. 45.

*Scrutton,* in commenting upon the *Great Indian Peninsula Railway* case, says:

> "The clause 'the ship lost or not lost' is now very usual. This clause only refers to losses through excepted perils."
>
> *Scrutton on Charter Parties and Bills of Lading,* 7th Ed., p. 304 note (*f*).

## POINT II.

**Impossibility of performance is no excuse for the non-performance of the obligations of a maritime contract.**

The appellant admits in its brief, as indeed it must, the general principle of the law of contracts that impossibility of performance is no execuse.

This principle has peculiar application to maritime contracts. In fact most of the cases commonly cited by the text writers in support of the principle are cases of maritime contracts.

*Wald's Pollock, Law of Contracts,* p. 356.

1 *Parsons Law of Contracts* (9th ed.) p. 603.

The reason for the peculiar application of the principle to maritime contracts is that maritime ventures are subject to such a variety of vicissitudes and perils that it is a matter of frequent occurrence for the performance of the obligation of one or the other of the parties to be rendered impossible. It is of the utmost practical importance to know in advance which party has assumed the risk of such unforeseen events. For this reason it has become the universal practice for the parties to maritime contracts to insert in the contract an enumeration of the perils for which they shall not be held responsible and which will excuse the performance of the obligation.

*Scrutton on Charter Parties and Bills of Lading,* Art. 79.

*Carver Carriage by Sea* (6th ed.) Sec. 74, p. 102.

*Anson Law of Contracts,* p. 325.

In the absence of an exception expressed in the contract, impossibility of performance is no excuse.

*Spence* v. *Chodwick,* 10 Q. B. (10 A. & E., n. s.) 517.
*Hills* v. *Sughrue,* 15 Messon & Welsby 253.
*Kearon* v. *Pearson,* 7 H. & N. 386.
*Jacobs* v. *Credit Lyonnais,* 12 Q. B. D. 589.

In *Carver's Carriage by Sea* (6th ed.) at page 102, Art. 74, it is said:

> "The contract of the ship owner in the bill of lading is, that he will, subject to the excepted perils, which we shall presently discuss, deliver the goods at their destination 'in like order and condition' in which they were when shipped. It is therefore in form an absolute undertaking subject to those exceptions; so that the exceptions implied by the law in the absence of an express contract, do not, it would seem, avail the ship owner unless they are expressly excepted."

In *Spence* v. *Chodwick, supra,* it was held no answer on the part of the ship owner to his failure to deliver the cargo, that the goods were confiscated at a foreign port.

In *Hills* v. *Sughrue, supra,* it was held no answer to an obligation to proceed to the Island of Ichaboe and there load a full cargo of guano, that contrary to the expectation of both parties, there was not a full cargo of guano in existence at Ichaboe.

In *Kearon* v. *Pearson, supra,* it was held no defense to a claim for demurrage, that loading within the agreed number of lay days was rendered impossible by frost.

It has frequently been adjudicated that an abso-

lute obligation of the charterer to load or discharge within a given number of days is not excused by a circumstance beyond his control.

*Budgett* v. *Binnington* [1891], 1 Q. B. 35.
*Thies* v. *Byers*, 1 Q. B. D. 244.
*Empire Transp. Co.* v. *Philadelphia, etc., Co.*, 77 Fed. 919, and cases cited at p. 921.

In the case of *Budgett* v. *Binnington, supra,* Lopes, *L. J. P.*, said at pages 40-41:

> "Three questions arise. First, what is the contract? second, has there been a breach of it? and, third, is that breach excused? The contract is an absolute and independent contract, and not a conditional one. It is a contract creating an absolute obligation in the merchant to have the goods unloaded within a specified time, whatever the circumstances may be, unless the ship owner or those for whom he is responsible are in fault."

The principle under discussion should not be confused with the principle of an implied condition upon which the obligations of the parties are mutually dependent, such as the continued existence of the vessel at the time when a charter party is to begin, the failure of which will absolve *both* parties from their obligations. It is also to be distinguished from the similar principle of a frustration of the venture by the happening of some circumstance which defeats the mutual purpose of the parties and relieves *both* of them from the entire contract or from a severable portion thereof. This principle is considered under a subsequent point.

The cases discussed upon appellant's brief aris-

ing under contracts for personal services and other contracts remote from maritime law are of little assistance in determining the issues of the present cases.

## POINT III.

**It has long been regarded as an established principle of maritime law that an embargo does not abrogate but simply suspends the performance of a charter party.**

An embargo has been defined by this Court as "a prohibition to sail". (*The William King,* 2 Wheat. 148, at p. 153.)

The leading case upon the subject of an embargo as affecting contracts of affreightment is *Hadley* v. *Clark,* 8 Term. Rep. (Durnford & Easts), 259. In that case the vessel received the plaintiff's cargo at Liverpool for carriage upon a voyage to Leghorn. The vessel then proceeded to Falmouth for the purpose of joining a convoy. While she was at Falmouth, the British Government laid an embargo on all vessels bound to Leghorn. She subsequently, but after a very considerable delay, returned to Liverpool and there compelled the plaintiff to retake possession of his cargo. The embargo was finally removed, after having been in effect for two years and three months. The question before the Court was whether the vessel had been justified in totally abandoning the performance of the voyage. No question of prepaid freight was involved.

The following are quotations from the opinion of the Judges in that case:

> Lord Kenyon, *Ch. J.*—"Whenever a case comes before us that is likely to be attended with hardship to the parties, a struggle naturally arises in our minds to find out (if possible) some way of extricating all the parties from it. In the present case, both parties are innocent; and whatever may be our decision, one party or the other must suffer. * * * It is admitted, that an embargo being imposed during the war, was a legal interruption of the voyage; but it would be attended with the most mischievous consequences if a temporary embargo were to put an end to such a contract as this; because, if it were to have that effect, it must also have the effect of putting an end to all contracts for freight and for wages" (8 Term Rep. 265).
>
> Grose, *J.*—"* * * After the contract was made, an embargo was imposed, which was only a temporary restraint, and prevented the ship's performing her voyage at that time; but still the defendants were bound to comply with the terms of the contract as soon as they reasonably could; even if we consider the embargo to have the same effect as an act of parliament, still it would only create a temporary restraint, until such time as the King in council should take off the embargo. Such an act of parliament would not dissolve, it would only suspend the execution of the contract; and the embargo cannot have a greater effect" (pp. 266-7).
>
> Lawrence, *J.*—"* * * The counsel for the defendants were driven to the necessity of introducing into this contract other terms than those which it contains: they contended, That the defendants were only bound to fulfill their engagement within a reasonable time; and then argued, That as the embargo pre-

> vented the completion of the contract within a reasonable time, the defendants were absolved from their engagement altogether: but it was incumbent on the defendants, when they entered into this contract, to specify the terms and conditions on which they would engage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms; *and absolutely engaged to carry the goods 'the dangers of the seas only excepted'; that therefore is the only excuse which they can make for not performing the contract. If they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract. * * * So, in this case, there was one accident against which the defendants provided by their contract; they might also have provided against an embargo; but we cannot vary the terms of this contract; and the defendants must be bound by the terms of the contract that they have made"* (pp. 267-8).

From the date of its decision continuously until the present time *Hadley* v. *Clark* has been followed both in England and in this country, has been quoted by all the text writers on maritime law as a leading case and has been cited and relied upon by analogy in a large number of other maritime cases. Appellant on pages 34 and 35 of its brief refers to three English cases decided within the last two years, in which doubt has been expressed as to the authority of *Hadley* v. *Clark*. These cases were not embargo cases, but were cases in which the parties sought to rely upon the principles of *Hadley* v. *Clark* by analogy. In view of the cases cited, *Scrutton on Charter Parties*, 8th Ed. (1917), page 91, states that the case has been discredited. In the following text books, however, *Hadley* v.

*Clark* is stated with approval as representing well settled law:

*Carver Carriage by Sea,* 6th Ed. (1918), Sec. 242, p. 324.

*Abbott on Merchant Ships and Seamen,* 14th Ed. (1901), p. 874.

*Parsons Law of Contracts,* 9th Ed. (1904), Vol. 2, p. 828.

In this country the case of *Hadley* v. *Clark* has been followed in every case involving embargo, and it is well established law that an embargo suspends but does not abrogate a charter party.

*Odlin* v. *The Ins. Co. of Penn.,* 2 Wash. (U. S.) 312, at pp. 317-18.

*M'Bride* v. *The Marine Ins. Co.,* 5 Johns. (N. Y.) 299, at p. 308.

*Palmer* v. *Lorillard,* 16 Johns. 348.

*Bayliss* v. *Fettyplace,* 7 Mass. 324.

*Tirrell* v. *Gage,* 4 Allen 245.

*Lorent & Steinmetz* v. *South Carolina Ins. Co.,* 1 Nott & McCord (S. C.) 505, at p. 509.

*Kelly* v. *Johnson, et al.,* 3 Wash. 45; 14 Fed. Cas. No. 7672.

*Braithwaite* v. *Power,* 1 N. D. 455.

In *Odlin* v. *The Ins. Co. of Penn., supra,* 2 Wash. 312, at pages 317-18, in which *Hadley* v. *Clark* is cited and approved, Judge Washington said:

> "In Touteng *v.* Hubbard, 3 Bos. & P. 291, which respects the embargo laid by Great Britain on Swedish vessels, Lord Alvanley declares, in the most unqualified terms, that a common embargo does not put an end to any contract between the parties, but that it is to be considered as a temporary suspension of it

only; and that the parties must submit to whatever inconveniences may arise, unless they have provided against it by the terms of their contract."

In the New York case of *M'Bride* v. *The Marine Ins. Co., supra,* 5 Johns. 299, at page 308, Chancellor Kent said:

"When both parties belong to the same government, the act of the government is as much the act of one party as of the other, and each ought to be equally estopped from taking advantage of it, to the prejudice of the other."

In the case of *Lorent & Steinmetz* v. *Ins. Co., supra,* 1 Nott & McCord, 505, the South Carolina Court, at page 509, said:

"But a limited embargo only suspends the performance, and does not prohibit it. This is also clear. Mar. ..... ..... 3 B. & P. 291. 2 Hall, L. J. 229. 5 John. 299. It rather acknowledges the legality, by suspending the privilege of executing the contract for a given time. In such cases, the doctrine is established, that the parties are still to perform whatever is not forbidden. The law makes as little infraction as possible, and it follows, that the contract is to be performed at the end of the suspension, because no longer forbidden. In a word, the contract remains unaltered, and the suspension is the very peril insured against."

**An embargo is almost inevitably indefinite as to duration.**

The embargo under which *Hadley* v. *Clark* arose was imposed until further order, and in fact lasted two years and three months. Our embargo of 1807 was absolute in its terms. As to this embargo

Chancellor Kent in the case of *M'Bride* v. *Marine Ins. Co.* said:

> "An embargo is not required to be, upon the face of the act, definite as to time. It is frequently otherwise; and the case of the British embargo on vessels bound to Leghorn as stated in *Hadley* v. *Clark* (8 Term Rep. 259) is a pertinent and strong instance of the kind. *But it is, from the very nature and policy of the measure, a temporary restraint.*" 5 Johns. (N. Y.) 308.

**An embargo does not render performance illegal within the usual meaning of the term "Illegality".**

There is an obvious difference between an embargo which temporarily suspends the performance of a charter party and a law which renders an act contrary to the municipal law or public policy of the country. As stated by the South Carolina Court in *Lorent & Steinmetz* v. *Ins. Co., supra,* 1 Nott & McCord, 505, at page 509,

> "but a limited embargo only suspends the performance and does not prohibit it. * * * It rather acknowledges the legality, by suspending the privilege of executing the contract for a given time".

*Parsons Law of Contracts,* 9th Ed. (1904) Vol. 2, at page 828, says:

> "A law may however have the effect of suspending an agreement that was originally valid and which it makes impossible without violation of the law; and yet leave the contract so far subsisting that upon a repeal of the law the force and obligation of the contract remain." (Citing *Bayliss* v. *Fettyplace,* 7 Mass. 325 and *Hadley* v. *Clark,* 8 T. R. 259).

## Equality of the parties.

The law upon the subject of embargo, as above stated, has the decided merit of treating the parties alike and placing them upon an equal footing for the purpose of any negotiations looking toward the cancellation of the suspended charter or the use of the vessel and specific cargo during the period of the embargo. A substitute voyage can be agreed upon, or the vessel may consent to discharge the cargo and return the freight, if prepaid, upon receiving from the shipper its obligation to furnish a substitute cargo at the same rate of freight as soon as the restraint shall be removed. If freight has not been prepaid, the vessel, before surrendering the cargo, is in a position to demand security that it will subsequently be given an opportunity to earn the freight. That the shipper, upon giving such security may compel the surrender of his cargo, is suggested in the case of *Palmer* v. *Lorillard,* 16 Johns. (N. Y.) 348.

The case of *Braithwaite* v. *Power,* decided by the Supreme Court of North Dakota in 1891 (1 N. Da. 455) cited and followed the case of *Hadley* v. *Clark.* It contains an exceptionally thorough and accurate discussion of the law of maritime freight by Corliss, *C. J.* In that case the Eclipse sailed from Bismark, Dakota, up the Missouri River for Ft. Buford, Montana. When about sixty miles from destination, the Eclipse was frozen in. Held, the vessel was entitled to retain the cargo on board until the resumption of navigation in the spring in order to earn freight. In the course of his discussion of the principles of maritime freight, Corliss, *C. J.,* said:

> "It is true that the master was at liberty to forward the freight by other means. 1 Pars. Shipp. & Adm. 233 and cases cited. This he was

given no opportunity to do. It is also true that he might without legal fault have waited until the opening of navigation in the spring to resume his voyage and transport the freight to its destination in the bottom in which it was originally shipped" (p. 459).

**Application of the law of embargo to the cases at bar.**

The "Allanwilde", in repudiating all further obligation under its contracts with the libelants and requiring them to retake their cargoes without offering to return the prepaid freight and without giving security or even promising that the voyage would be carried out upon the lifting of the embargo, committed a breach of both contracts. The measure of damages for this breach should not have been merely the amount of the prepaid freight, but the full damages sustained by the libelants in consequence of the failure of the vessel to transport the cargo or cause it to be transported to Rochefort, France.

Unless this Court should decide that the law heretofore existing in this country upon the subject of the effect of an embargo upon contracts of affreightment should be modified, all of the four questions certified by the Circuit Court of Appeals must be answered in favor of the shippers.

The case of *International Paper Co.* v. *Schooner Gracie D. Chambers,* to be argued contemporaneously with the present cases, does not involve the right of the shipper to insist upon the continuance of the contract, since in that case the shipper himself claimed the right to disaffirm the contract and demanded the return of his cargo, together with the amount of the prepaid freight. In the present cases the disaffirmance was by the vessel.

## POINT IV.

**The principle of "Frustration of Venture", in the sense in which it is urged by appellant, is a principle properly applicable only to contracts, or the severable portions thereof, remaining executory on both sides.**

Appellant contends that the delay entailed by the embargo operated as a frustration of the commercial venture contemplated in the charter party, and therefore had the happy consequence of relieving appellant from its obligations under the contract, while permitting it to retain the fruits. There is no such principle of "frustration of venture".

"Frustration of venture", in the sense in question, is an equitable principle, mutually applicable to relieve *both* parties from an executory contract, the entire purpose of which has been frustrated by the happening of an unanticipated event. It is more accurate to use the term "dissolution of the contract". Under this heading *Carver's Carriage by Sea* states:

> "Hence it may be inferred that the intention was that the agreed voyage was to be performed, provided that no delay should occur such as to frustrate its objects *before it commenced;* but that if such a delay should arise, without any fault of either party, the transaction was not to be carried through. If, then, a delay of this kind has occurred *before the loading,* either party may treat the contract as dissolved and at an end" (Carver, 6th Ed., Sec. 232, pp. 308-9).

Again, in Section 237, under the same title, "dissolution of the contract", Carver says:

> "But the contract may have been lawful originally and yet its performance may have become unlawful by a subsequent act of the government, as, by an order prohibiting the trade; or by an outbreak of war with the country to which the ship belongs or from which the intended cargo is to be procured and shipped. *Where this happens before a cargo has been put on board the contract is dissolved*" (Carver, 6th Ed., p. 319).

Carver then proceeds to discuss and approve the case of *Hadley* v. *Clark* (Carver, 6th Ed., Sec. 242, pp. 324-5).

It will be observed that the cases relied upon by appellant to support its doctrine of "frustration of venture" either remained wholly executory on both sides or were severable contracts which remained mutually executory as to the obligations in question.

The case of *Horlock* v. *Beal* [1916], 1 A. C. 486; 114 L. T. 193 (Appellant's brief, pp. 22, 23), was an action brought by the wife of a seaman to recover wages accruing after the vessel had been interned and the seamen removed from the vessel.

In the case of *Tamplin SS. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co.* [1916], 2 A. C. 397; 115 L. T. 315 (Appellant's Brief, pp. 22, 23-25), a time charter for five years was held not to be frustrated by the requisitioning of the vessel and its remodeling and employment for a number of months by the British Government.

In the two cases of *Scottish Navigation Co., Ltd.*, v. *W. A. Souter & Co.*, and *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* [1917], 1 K. B. 222, 236, 115 L. T. 812 (Appellant's Brief, pp. 26-28), the charterers of two interned vessels upon which

the charter hire was payable upon a monthly basis and had been paid up to the time of the internment were held not liable for charter hire accruing after the internment.

In the case of *Anglo-Northern Trading Co., Ltd.* v. *Emlyn, Jones & Williams* [1917] 2 K. B. 78; 116 L. T. 414, (Appellant's Brief, pp. 28-29), a time charterer of a vessel which was requisitioned four months before the termination of the charter period was held not liable for charter hire accruing after the requisitioning.

In the case of *Horlock* v. *Beal, supra,* from which appellant quotes, Lord Atkinson cites:

> "That a delay in carrying out a charter party caused by something for which neither party are responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, *at least while the contract was executory,* to consider it at an end" ([1916] 1 A. C. p. 501).

The same language is found in that very portion of the opinion of Lord Loreburn in the *Tamplin S. S. Co.* case, which is quoted by appellant on page 25 of its brief:

> "In all these three cases it was held, to use the language of Lord Blackburn, 'that a delay * * * entitled either of them, *at least while the contract was executory,* to consider it at an end'" (Appellant's Brief, p. 25).

Bailhache, *J.,* in his opinion in *Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.,* in the lower court, 114 L. T. 173, says at page 175:

> "It seems to me impossible to apply the doctrine of frustation to a case where one of the parties to the contract is fully performing his part of the contract according to its terms."

The necessary mutuality of the doctrine of "dissolution of the contract" is well expressed in the very language quoted in italics on page 27 of appellant's brief from the opinion of Lord Justice Eady in the *Admiral Shipping Co.* case:

> "It is the further performance of the contract by one party which formed the consideration for the payment by the other, which has become impossible, and this effects a dissolution of the contract" (Appellant's Brief, p. 27).

The equitable principle of dissolution by frustration is sometimes stated to be a matter of presumed mutual intention of the parties.

In the *Tamplin S. S. Co.* case, *supra,* in which it was held that a five year charter party should not be treated as dissolved by the requisitioning of the vessel, which requisitioning might be for only a short time, Lord Loreburn said:

> "Were the altered conditions such that had they thought of them they would have taken their chances of them or such that as sensible men they would have stated 'if that happens, of course it is all over between us'?" ([1916] 2 A. C. p. 404).

Applying this test, let us suppose the following question had been put to the present parties at the time of signing the charter party: What is to happen if an embargo should be imposed upon the intended voyage before the cargo is loaded? It might well be assumed that both parties would have answered that question by saying: "Why, in that case the venture would be frustrated and neither party would be held to perform the contract". But suppose at the time of signing the

contract this question had been posed: What if an embargo should be imposed after the cargo has been laden on board and the freight paid? Is it conceivable that the shippers would have replied to that question by saying: "In such an event the vessel will be totally excused from performing the voyage and may retain the prepaid freight".

The doctrine of frustration, in the sense of dissolution is an equitable principle, which, if applied, must be applied for the benefit of the one party as well as the other. It may well be said of a contract wholly executory on both sides that the happenings of an event not anticipated by either party "dissolves" the contract. It is idle, however, to speak of dissolving a contract under which one party has paid in advance the full consideration for a service to be rendered by the other party. Possibly in such a case the vessel might be permitted to take advantage of an exception expressed in the charter party or possibly it might be permitted to rescind the contract by restoring the prepaid consideration for the service unrendered. Obviously it cannot take advantage of the principle of dissolution.

It must be borne in mind that the term "frustration of venture" is very commonly used in a sense different from that of the dissolution of the contract. When in the course of the performance of a voyage or charter party an obstacle arises which comes within one of the excepted perils specified in the contract, it frequently becomes necessary to determine whether that obstacle excuses delay in the performance of the voyage only, or whether it excuses altogether the further performance of the contract. In such a case the carrier has no further liability if it be found impracticable to complete the

voyage. The only question to determine therefore is whether the completion be practicable or not. It will be found that most of the cases relied upon by appellant under the subject of "frustration of venture" used the term in the sense here suggested rather than in the sense of a cause self-sufficient to dissolve the contract.

The following, among other of the cases principally relied upon by appellant under "frustration of venture" contained a "restraints of princes, rulers and peoples" or similar exception.

*Geipel* v. *Smith,* L. R., 7 Q. B. 404.

*Anglo-Northern Trading Co., Ltd.,* v. *Emlyn, et al.,* [1917] 2 K. B. 78.

*Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co.,* [1917] 1 K. B. 222.

*Admiral Shipping Co.* v. *Weidner, Hopkins & Co.,* [1917] 1 K. B. 222.

*Tamplin SS. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co.,* [1916] 2 A. C. 397.

*E. Hulton & Co., Ltd.* v. *Chadwick & Taylor, Ltd.* 33 T. L. R. 363.

*Lloyd R. Belge So.* v. *Strathatos,* 33 T. L. R. 390; 34 T. L. R. 70.

## POINT V.

**By failing to insert any exceptions in its charter party or bill of lading (other than the dangers of the seas) the "Allanwilde", in the principal case, assumed an absolute obligation to deliver the cargo at Rochefort, France, from which obligation it will not be absolved by the Court.**

Under Point II, *supra,* the peculiar applicability to maritime contracts of the principle that impossibility of performance is no excuse, has been discussed. It has become as general in maritime contracts to insert the excepted perils for which the carrier is not to be responsible, as it has in the case of marine insurance policies to insert the so-called warranties defining the character of losses which are to be excepted from the general words of the policy. In almost every maritime case cited upon appellant's brief the contract contained an exception of "restraint of princes, rulers and peoples", and the exception was expressly relied upon by the parties.

The effect of the absence of exceptions is illustrated by such cases as:

*Hills* v. *Sughrue,* 15 M. & W. 253.
*Budgett* v. *Binnington* [1891], 1 Q. B. 35.
*The Harriman,* 9 Wall. 161.
*Empire Transportation Co.* v. *Philadelphia, etc., Co.,* 77 Fed. 919, 921.

Appellant places its chief reliance upon the recent decision of this Court in *The Kronprinzessin*

*Cecilie,* 244 U. S. 12. Although the contract in that case contained an express exception of "arrest and restraint of princes, rulers or people", doubt was expressed as to whether the vessel could rely upon the exception to excuse the act of putting back before a state of war had actually arisen. It was urged on behalf of the vessel that the restraint of princes might never have affected the voyage, at least as concerned the cargo, if the master had not put back when he did. In the view of this Court, however, the act of the master was not only reasonable under the circumstances, but was his actual duty toward the vessel and passengers. After the vessel had reached Bar Harbor, there could be no question but that any further attempt to prosecute the voyage was prevented by a restraint of princes.

Possibly the doubt expressed by this Court as to the extent of the restraint of princes clause was caused in part by the very recent prior decision of the English Court of Appeal (subsequently affirmed by the House of Lords) in the case of *Watts, Watts & Co., Ltd.* v. *Mitsui & Co., Ltd.* [1916], 2 K. B. 826; [1917] A. C. 227. In that case the shipowner, who had contracted to furnish a vessel for a voyage from the Black Sea to Japan, refused on September 1st to declare a vessel under the charter party, alleging that Great Britain had closed the Dardanelles. Great Britain had not closed the Dardanelles, but subsequently on September 26th or 27th Turkey closed the Dardanelles. Watts, Watts & Co. sought to excuse their breach of contract under the exception of restraints of princes. The Court, however, did not regard the mere expectation that Great Britain would impose a restraint as being sufficient to excuse performance

under the exception, even though a restraint was in fact subsequently imposed by Turkey.

It is submitted that the *Kronprinzessin Cecilie* and *Watts, Watts & Co., Ltd.*, cases are not authorities for the proposition that the omission of a restraint of princes exception is immaterial. On the contrary, in view of the emphasis laid upon the exception in both cases they are authorities for its practical importance In the *Watts* case the scope of the "restraint of princes" exception was the principal point considered by all the Courts. In all of the maritime cases relied upon by this Court in reaching its decision in the *Kronprizessin Cecilie* case the contract contained an exception of "restraints of princes" and such exception was the principal reliance of the defense.

*The Styria,* 186 U. S. 1.
*The Teutonia,* L. R. 4 P. C. 171.
*The San Roman,* L. R. 5 P. C. 301.
*Watts, Watts & Co., Ltd.* v. *Mitsui & Co., Ltd.* [1916], 2 K. B. 826; L. R. [1917] A. C. 227.

Likewise

*Nobel's Explosives Co.* v. *Jenkins,* L. R. [1896] 2 Q. B. 326.
*Geipel* v. *Smith,* L. R., 7 Q. B. 404.

The necessity of a "restraint of princes" exception to excuse the "Allanwilde" in the present cases is the view expressed by the Circuit Court of Appeals for the Second Circuit in the case of *International Paper Co.* v. *Schooner Gracie D. Chambers,* now pending in this Court on writ of *certiorari.* That is an action brought by a shipper who had demanded the return of his goods and there-

after sued to recover his prepaid freight. The bill of lading expressly excepted "restraints of princes, rulers and peoples". The opinion of the Circuit Court of Appeals, as certified to this Court, contains the following dictum:

> "If the bill of lading had contained no exception of restraint of princes the government's embargo would have been no defense to the carrier in a suit by the shipper upon the bill of lading. The shipper would have been entitled to recover the prepaid freight and damages for the carrier's failure to deliver."
>
> (*International Paper Co.* v. *Gracie D. Chambers,* Transcript of Record, p. 41.)

After the certification of the record to this Court the Circuit Court of Appeals modified its opinion by the omission of the dictum above quoted, apparently desiring to await the decision of this Court in the present cases before committing itself upon the suggested contingency. Nevertheless, the very ground upon which the Circuit Court of Appeals based its decision in the *Gracie D. Chambers* case was the restraint of princes clause. The Court, in its opinion, said:

> "What the parties intend is that the carrier shall keep the freight even if he does not deliver the cargo, *unless the failure to deliver be due* to the carrier's fault or *to a peril not excepted in the bill of lading or charter party.*"
>
> *International Paper Co.* v. *Gracie D. Chambers,* Record, p. 41; Appellant's Brief, Appendix 2, p. 56.

In the present principal case the "Allanwilde" not only inserted no exception of "restraint of princes, rulers and peoples" to qualify its obligation, but expressly negatived the intention of such

an exception by inserting in the bill of lading "the dangers of the seas *only* excepted". Certainly the Court will not imply such an exception in the contract for the exclusive benefit of the carrier while leaving it in possession of the prepaid compensation for the service which has not been rendered.

Nothwithstanding the imposition of the embargo, there remained two ways in which the appellant might perform its unqualified obligation to deliver libelants' cargo at Rochefort: (1) it might transship the cargo by a vessel which would be permitted to make the voyage, or (2) it might hold the cargo awaiting the removal of the embargo. An embargo is inherently a temporary restraint. Such is the doctrine of the law previously discussed.

## POINT VI.

**If the "Allanwilde" asks to be excused from the performance of its obligation, it must in any event return the prepaid freight.**

Appellant concedes, as indeed it must, that, had it not been for the imposition of the embargo, the "Allanwilde" would have been obliged to proceed upon its voyage to Rochefort before it would have performed the service for which the freight was prepaid. It is now urged that by virtue of the embargo the vessel was happily discharged altogether from her obligation and enabled to retain the full amount of the prepaid freight while being free to be employed in earning *a second freight during the very period contemplated in the charter*

*party for the earning of libelants' freight.* Such a view would, indeed, as the District Court has well said, make the embargo a windfall for the vessel. The latter would be enabled to earn two freights during the same period, while the shipper, in addition to paying the double rate to forward his cargo, by steamer, would be obliged to lose the freight which it had paid to the vessel for the unrendered service. To quote the District Court:

> "Not only would the shipper be denied the benefits which it would have derived had the shipowner carried out the charter party, but it would also have to pay for services agreed to be performed by the shipowner but not rendered; while the shipowner would in addition to retaining the unearned freight money, have the commercial use of its vessel during the very period it was chartered for the shipper's use. The embargo in such a case, instead of being a detriment, would be a decided benefit—a veritable windfall for the shipowner. So inequitable would this result be that a court controlled by equitable principles should not be a party to its consummation, unless constrained by strict law. No such law has been brought to my notice" (247 Fed., pp. 238-9; appendix I hereof).

It is possible a court might feel constrained to admit the inequitable result mentioned in a situation where the contract of affreightment combines a provision for the irrevocable prepayment of freight with an exception of "restraints of princes". It certainly will not countenance such a result when the shipowner is himself the suitor asking relief from his unqualified obligation. The greatest right the vessel can ask is the right to *rescind* the contract, thereby absolving itself from its obligation upon returning the freight to the shipper.

A close analogy to the present case would be presented by a contract for the sale of a vessel, providing for the prepayment of the purchase price and containing an unqualified obligation on the part of the seller to deliver the vessel at a future date. Assume the full amount of the purchase price to be prepaid and the United States Shipping Board thereafter to forbid the transfer under its temporary war power to that effect. Even if the contract contained a stipulation that the purchase price should be irrevocably prepaid, would it be permitted to the seller to repudiate all further liability under the contract and employ the vessel for his own benefit, while retaining the full purchase price?

**Appellant's cases.**

The cases cited by appellant under Point II of its brief will not be found to support the inequitable result sought.

In *The Saratoga,* 2 Gallison 164 (Appellant's Brief, p. 42) the views expressed by Judge Story are not of assistance to libelant. Judge Story there pointed out that a capture, at least before condemnation, does not terminate the voyage.

*Scott* v. *Libby,* 2 Johns. (N. Y.) 336 (Appellant's Brief, p. 42) is an authority against appellant.

The English coronation cases cited by appellant on pages 41, 42 of its brief were cases of great perplexity, both to the Courts which decided them and to text writers who have discussed them. In *Chandler* v. *Webster* [1904] 1 K. B. 493, the defendant agreed to let to the plaintiff a room which the plaintiff purposed to use for viewing the corona-

tion. In *Civil Service Society* v. *General Steam Co.* [1903] 2 K. B. 756, the defendant chartered to the plaintiff for three days a vessel which the plaintiff purposed to use as an excursion boat for viewing the coronation naval procession. In both cases the rental or charter hire was paid in advance and in both cases the Court held that the payments so made could not be recovered. It must be observed that in these cases the defendants had done or stood ready to do all that they had agreed to do, namely, turn over the room and the vessel for the use of the plaintiffs. The latter were the parties seeking to be relieved from their obligation. Had the defendants assumed the obligation of supplying the spectacle the problem before the Court would have been very different.

In *Lloyd Royal Belge Soc.* v. *Strathatos,* 33 Times L. R. 390 (Appellant's Brief, p. 43) the charter party was in the nature of a demise, hire being paid at a fixed rate per month until re-delivery of the vessel to the owner. The charter party also contained an express exception of "arrests and restraints of princes, rulers and peoples". On December 2, 1916, the vessel was placed at the disposition of the charterer and the first month's hire paid. Subsequently on December 12, the British Government having imposed a restraint on all Greek vessels, and the Parthanon being detained at Gibraltar, the charterers served notice that they regarded the charter party as at an end. The Court held that, while the restraint excused both parties from further performance, it did not entitle the charterer to recover the first month's hire.

*Appleby* v. *Myers,* L. R. 2 C. P. 651 (Appellant's Brief, p. 43) was a building contract, in which the

subject-matter of the contract was destroyed. Blackburn, *J.*, said at page 660:

> "The case is in principle like that of a shipowner who has been excused from the performance of his contract to carry goods to their destination, because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment on account of the part performance of the voyage."

The case of *Metropolitan Water Board* v. *Dick Kerr & Co.* [1917] 2 K. B. 1 (Appellant's Brief, p. 43) involved the work upon a large reservoir which the defendants were under contract to construct for the Metropolitan Water Board. Government regulations interfered with the work and finally under its war time power the Government totally forbade the continuance of the work. The trial court held the contract not to be "determined". The Court of Appeal reversed this decision and held the contract to have been determined. Partial payments had been made to the construction company and valuable equipment had been erected by the Company. As to these matters it was said:

> "The result may raise numerous other questions as to the rights of the parties in respect of work already done and advances made. We have not the materials to deal with these cases in this action." (Scrutton, *L. J.*, p. 37.)

All the cases cited on pages 44-47 of appellant's brief in support of the English rule of prepaid freight and the analagous American cases containing the "irrevocably prepaid" stipulation were cases *where disaster befell both vessel and cargo* and not cases where the vessel was at once freed to earn a second freight during the period contem-

plated by the contract. Even under the English rule, as herein stated *supra,* it is open to the shipper to recover the amount of the prepaid freight as an item of damage if for reasons not excepted in the charter party the ship fails to perform the voyage.

*Dufourcet & Co.* v. *Bishop,* 18 Q. B. D. 373.

*The Great Indian Peninsula Ry. Co.* v. *Turnbull,* 53 L. T. 325.

All of the cases cited by appellant must be read with the expressed exception in mind. In none of these cases did the shipper urge the absence of an exception from the contract of affreightment. In the following cases the Court expressly mentioned the presence of the exception and expressly relied upon it.

*Greeves, et al.* v. *West India & Pacific S. S. Co.,* 22 L. T. R. 615, 620.

*The Queensmore,* 51 Fed. 250.

*Burn Line, Ltd.,* v. *United States & A. S. S. Co.,* 162 Fed. 298.

*International Paper Co.* v. *Schooner Gracie D. Chambers* (Appellant's Brief, Appendix II).

The decision of the Circuit Court of Appeals in *International Paper Co.* v. *Schooner Gracie D. Chambers, supra,* is an authority against appellant, as stated under the preceding point.

The case of *A. Cocker & Co.* v. *Limerick SS. Co., Ltd.,* 118 L. T. 726 (Appellant's Brief, pp. 46-7) will doubtless receive fuller discussion before this Court in connection with the issues presented in the Gracie D. Chambers appeal than it deserved

in the present case. The charter party in the Cocker case would appear to have contained the usual excepted peril of fire. In order to understand the case, however, it is further necessary to bear in mind that the rights of the shippers of the cargo were not before the Court for consideration. A. Cocker & Co., Ltd. operated a steamship line from Liverpool to Archangel. For use in connection with its regular service, it chartered the "Coonagh" from the Limerick Steamship Co., Ltd. Cocker & Co. had received a general cargo for the vessel and collected its own freight therefor under contracts which made the freight payable upon delivery of the cargo for shipment. When the "Coonagh" had loaded all but 94 tons of a full cargo, she burned and sank at the pier. The question then arose as between the steamship line and the vessel owner as to whether all of the freights which had been collected from the shippers had been collected on behalf of the steamship line or whether that portion of them which represented the freight payable by the Cocker Company to the Limerick Steamship Co. under the charter party of the vessel had been collected on behalf of the vessel. The Court held that as between the vessel and the steamship line the freights collected belonged to the Limerick Steamship Co. to the extent of the freight which was payable to the vessel upon each ton of cargo. In the House of Lords no judicial precedent was cited by any of the Judges. In the Court of Appeal, the case was decided upon the authority of *Wehner* v. *Dene Shipping Co.* [1905] 2 K. B. 92 at page 98, a case which did not relate in any way to the earning of freight, but merely held that an agent who collected freight from a subcharterer held the freight so collected in trust for

the shipowner to the extent of the unpaid charter hire.

In the Cocker case it was not in the interest of either party to intimate any right in the shippers to recover their prepaid freights. The only issue presented for adjudication was that of the apportionment of the freights so collected between the steamship line and the vessel owner. The facts upon which the issue was presented are succinctly stated in the report of the Court of Appeal decision as given in 33 Times L. R. 103.

## POINT VII.

### All four questions submitted by the Circuit Court of Appeals should be answered in the negative.

Unless this Court should determine to depart from the hitherto recognized principle of law applicable to the situation created by an embargo, it must answer the first and third questions in the negative. The embargo did not frustrate, but simply suspended the performance of the contracts of affreightment. Neither party could rescind the contract. The shipper could not demand the surrender of his cargo and deprive the vessel of its right to earn and retain the prepaid freight. The vessel, on the other hand, could not discharge the cargo without at least giving security for the future performance of the voyage.

If the Court should regard the existing law of embargo as too rigid and as requiring modification in view of a more liberal trend in modern cases arising under other branches of maritime law, it

can, at the most, permit the vessel to rescind the contract upon returning the consideration paid for the unperformed service. Such a view would require a negative answer to the second and fourth questions.

Finally, under no relaxation of the existing principles of law applicable to maritime contracts, can the "Allanwilde" be excused from its unqualified obligation to the Vacuum Oil Company to deliver its cargo at Rochefort, France (the perils of the seas only excepted), while retaining the full consideration paid for that unqualified obligation. Whatever answer may be given to the other questions, the second question must be answered in the negative.

Respectfully submitted,

JOHN C. PRIZER,
Counsel for Vacuum Oil Company and A. W. Pidwell, Libelants-Appellees.

BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors.

## Appendix I.

(247 Fed. 236.)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

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|---|---|
| VACUUM OIL COMPANY, Libelant,<br>v.<br>SAILING VESSEL ALLANWILDE<br>AND<br>ALLANWILDE TRANSPORT CORPORATION, Claimant. | IN ADMIRALTY<br>Libel against the Schooner Allanwilde for a breach of maritime duty in abandoning a charter-party to carry libelant's cargo from New York to Rochefort, France. Decree for Libelant. |

BARRY, WAINWRIGHT, THACHER & SYMMERS (JOHN C. PRIZER of counsel) for Libelant.
DUNCAN & MOUNT (O. D. DUNCAN & COURTLAND PALMER of counsel) for Claimant.

### MEMORANDUM.

RELLSTAB, *District Judge.*

The same reasons that impelled me to give an immediate hearing to this case prompt me now, at the close of the argument, to decide it.

I am mindful that whatever decision this Court may make, or whatever may be the final decision on review, one if not both of the parties will suffer loss. The charter-party entered into was a legal

contract and under it the ship owner was obligated to transport the cargo to a port in France, subject to such exceptions and exemptions as the charter mentioned and which the maritime law annexes to such a contract.

The Allanwilde—a sailing vessel—began the voyage, but, under the stress of a heavy gale, was compelled to seek a port of refuge. It returned to New York, the port from which it started. The return was justified, and neither the vessel nor the owner can be charged with fault in that respect.

Between the dates of leaving and returning to the Port of New York, The Exports Administrative Board—a federal agency—promulgated a rule which, while it continued in force, prevented this vessel from resuming the voyage. This rule is as follows:

> "The Exports Administrative Board, in accordance with requests made by the United States Shipping Board and by the Navy Department, has instructed the Director of the Bureau of Export Licenses not to grant licenses for any proposed shipments by sailing vessels going through the war zone. It is, of course, obvious that steamers can navigate the war zone with less danger than slow-sailing craft, and sailing ships, if used in safer waters, would to an extent release steam vessels now used in such waters.
>
> "The attention of shippers is, therefore, called to the fact that clearance will be refused sailing vessels destined to proceed through the war zone regardless of the fact that the goods themselves may have already been licensed. Licenses will be granted in the future for shipments to European countries only on condition that the goods are to be shipped by some vessel other than a sailing vessel. The Board will re-

> voke licenses covering goods to be shipped through the war zone if any shippers attempt to ship them by sailing vessel."

This governmental act did not abrogate the charter-party, but it did prevent an immediate execution of it.

Under the terms of the charter-party the shipper had prepaid the freight. The ship owner, finding itself so restrained, concluded to abandon the voyage. It notified the shipper to unload the cargo, and that upon a failure to do so it would unload and store the same at the shipper's expense. It also refused to return the freight money, claiming that it had earned it under the following provisions of the charter-party:

> "Freight to be prepaid net on signing Bills of Lading in U. S. Gold or equivalent, free of discount, commission or insurance. Freight earned retained and irrevocable, Vessel lost or not lost."

The libelant, under protest, unloaded the cargo and filed this libel, alleging a breach of the charter-party and claiming damages by reason thereof.

The failure to proceed with the carriage of the cargo was not due to any fault of the ship owner, but to *vis major*. Such an interference was not guarded against in the contract and may be said to have been unanticipated. The return of the vessel to the port of departure did not absolve the ship owner from carrying out the charter-party. As to that obligation, it was the same as if the vessel had never left its dock. The government's embargo was not directed against cargoes of the kind covered by this charter-party, but against sailing vessels entering particular waters known as the war zone.

In my judgment, the reciprocal rights and obligations of the parties at the time of the government's embargo are to be determined as if the vessel had never started on its voyage. The embargo did not prevent a transhipment of the cargo, or prevent the ship owner retaining the cargo awaiting a lifting of the restriction.

In such circumstances the ship owner, it seems to me, was bound to either so retain or tranship the cargo. It did neither, but, for the purpose of having the use of its vessel in the waters not covered by the government's embargo, it ordered the shipper, as already noted, to remove the goods and retained the freight money as earned.

In my judgment, the ship owner's failure to do either and its forced return of the cargo and refusal to give up the freight money, constituted a breach of maritime duty. The clause, "freight earned retained and irrevocable, Vessel lost or not lost" can not mean that prepaid freight is earned the moment it is paid, regardless of any forwarding of the cargo. The vessel was not lost and no forwarding of the cargo had taken place. It is conceded that if the embargo had taken effect before the vessel had started on the voyage which proved to be futile, and the ship owner had insisted that the cargo should be retaken by the shipper, the freight money would have had to be returned.

To my mind, the fact that a futile attempt had been made to forward the cargo gave the ship owner no greater rights when its later attempts to make a new start were frustrated by the government's embargo. To absolve itself at that time of all obligations to forward the cargo mediately or immediately in order to have the use of the vessel for other purposes, it should at least have returned the

freight money which had been paid as compensation for its transportation. Such a return and the sharing of the losses incurred in consequence of the embargo is deemed equitable. In such circumstances, the ship owner loses the expense of loading the vessel, its use until unloaded, and the opportunity to earn the freight money under the charter-party, and the shipper loses the expense of unloading and the benefit of the lesser freight rate secured by said contract. To permit the ship owner to retain the freight money after insisting on the shipper retaking his cargo would, to my mind, be highly inequitable. Not only would the shipper be denied the benefits which it would have derived had the ship owner carried out the charter-party, but it would also have to pay for services agreed to be performed by the ship owner but not rendered; while the ship owner would, in addition to retaining the unearned freight money, have the commercial use of its vessel during the very period it was chartered for the shipper's use. The embargo in such a case, instead of being a detriment, would be a decided benefit—a veritable windfall—for the ship owner. So inequitable would this result be that a court controlled by equitable principles should not be a party to its consummation, unless constrained by strict law. No such law has been brought to my notice.

The libelant, in my judgment, is entitled to a decree for a return of the freight money, but nothing more. The record shows that the libelant was put to some expense in unloading the cargo from the Allanwilde, and that in shipping this cargo in a vessel that may enter the war zone, a freight almost double that paid to the ship owner in this case will have to be paid, but these expenses and larger

freight rates are such as in a balancing of the equities and apportioning of the losses incident to the enforcement of the embargo should be borne by the shipper on a return to it of the freight money.

The record does not disclose that the ship owner after returning to the port of departure was put to any expense in caring for the cargo, as distinguished from that resulting to it from caring for the vessel. If there are any such expenses and counsel cannot agree upon the amount thereof, a reference will be made to ascertain them. Otherwise, a final decree in the usual form may be entered in favor of the libelant for the sum of $49,745.50, the amount of the freight money prepaid as aforesaid.

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